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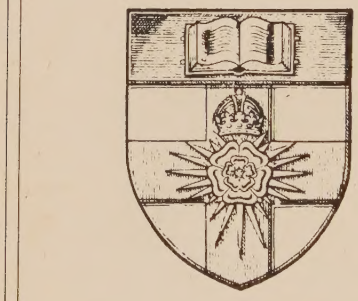

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King's Bench Division.

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CORRIGENDA.

Page 308, lines 7 and 8 from head of page, and line 7 from foot, *delete* in each case words between "*Nemo*" and "*vexari*," and *read* "*debet bis.*"

,, 322, line 6 from foot, *after* "proceeding" *delete* full stop, and *add* "and an acquittal expressly made defeasible by a case."

,, 479, footnote (1), *for* "GIBSON, J.," *read* "KENNY, J."

,, 514, line 16, *for* "*Woods*," *read* "*Ward.*"

CASES

DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1906.

KELLY, Appellant; RICE, Respondent (1).

K. B. Div.
1905.
May 6.

General Dealers (Ireland) Act, 1903 (3 *Edw.* 7, *c.* 44), *section* 2—*Application to dealings in articles other than those enumerated in sect.* 12.

Section 2 of the General Dealers (Ireland) Act, 1903, requires every general dealer to enter in a book the particulars of each transaction in his business, including certain particulars as to each article purchased by him, in default whereof he is liable to a penalty. Section 12 defines general dealer as meaning any person buying or selling certain specified articles, whether such person deals in those articles only, or together with second-hand goods or marine stores.

The defendant, a licensed general dealer, had in his possession a quantity of horsehair, the particulars of the purchase of which he had not entered in his book. Horsehair is not one of the articles specified in section 12:—

Held, that the defendant was not guilty of an offence under section 2.

Quære: Is a dealing in second-hand goods or marine stores, not consisting of any of the articles specifically enumerated in section 12, subject to the provisions of the Act?

(1) Before Lord O'Brien, L.C.J., and Gibson, J.

K. B. Div. 1905.

KELLY, *Appellant;* RICE, *Respondent.*

CASE STATED under 20 & 21 Vict. c. 43.

The following are the material facts, as set out in the case:—

At a Petty Sessions held for the Petty Sessions District of Ennis, the appellant was charged on summons on the complaint of the respondent, a District Inspector of the Royal Irish Constabulary, for that the appellant, being a person duly licensed under the General Dealers (Ireland) Act, 1903, had, on the 17th January, 1905, on his licensed premises at Drumbiggle, Ennis, county Clare, a quantity of hair, the proper and distinctive description of which he failed to enter in a book kept by him in compliance with the said Act. The summons contained further counts, charging the appellant with having failed to enter the name and place of abode of the person from whom the hair was purchased or received; having failed to enter the date and hour of the day of the purchase or transaction; and having failed to enter the price paid for the article.

At the hearing of the complaint it was proved, on the part of the complainant, that the appellant was the holder of a license under the General Dealers (Ireland) Act, 1903, for premises situate at Drumbiggle, Ennis, in the county of Clare, and that on the date mentioned in the several charges he carried on the business of a general dealer under such license at these premises. That on the date referred to the premises were entered and inspected by a sergeant of the Royal Irish Constabulary, acting under a written authority from a justice of the peace for the county of Clare, as provided by the Act. That amongst the various articles dealt in by the appellant under his general dealer's license, in the ordinary course of his business, and on the premises so licensed, the sergeant found a sack containing upwards of 5 cwt. of horsehair which had not undergone any manufacturing process, and which was valued at upwards of £60. That in the book required by the General Dealers Act to be kept by every general dealer, and which was so kept by the appellant, there was no entry of the proper and distinctive description of the said hair; nor of the name and place of abode of the person from whom the hair was purchased; nor of the date and hour of the day of the said transaction; nor of the price paid, or agreed to be paid, for the hair.

The justices convicted the appellant on each of the charges, and

ordered him to be fined 5*s*. and 1*s*. costs for each. By the present case, the judgment of the Court was required as to whether they were correct in point of law in their determination.

Ignatius O'Brien, *K.C.*, and *Comyn*, for the appellant.

Cecil Atkinson, for the respondent.

LORD O'BRIEN, L.C.J. :—

The question in this case arises under the General Dealers (Ireland) Act, 1903. The appellant was summoned before the magistrates at Ennis, in county Clare, the offence charged being that he, a licensed general dealer, had on his licensed premises a quantity of horsehair, the description of which, and the name and abode of the person from whom he purchased it, and certain other particulars required by the Act, he had not entered in a book.

Now, who is a "general dealer" within the Act of Parliament? The Act says (section 2 (2)) :—"Every general dealer shall enter in a book to be kept by him on his premises the particulars of each transaction in his business." The definition of general dealer is given in section 12. "In this Act, unless the context otherwise requires, the expression 'general dealer' means any person buying otherwise than at a public auction held by a licensed auctioneer, or selling, old metal, scrap-metal, broken metal, or partly manufactured metal goods in quantities, at each particular purchase or sale, of less, in the case of iron, than 10 cwt. or in the case of copper, of less than 56 lb. weight, or in the cases of lead, zinc, spelter, machinery or tools, respectively, of less than 112 lb. weight, or buying or selling in any quantities bottles, syphons, tools, bags, sacks, packing-cases, boxes, articles of pottery or glass, whether such person deals in those articles only or together with second-hand goods or marine stores; but the said expression does not include a pawnbroker or a licensed dealer in plate." It is practically admitted that horsehair, such as we are dealing with here, is not within that definition. No doubt the prefatory words to the section are "unless the context otherwise requires"; but there is no section in the Act of Parliament

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KELLY, *Appellant*; RICE, *Respondent.*

Lord O'Brien, L.C.J.

which requires the dealer to take out a license for anything except what is specified in section 12. We are, therefore, in my opinion, bound to interpret this definition section as we find it, and see what is included in it. Horsehair, such as we are dealing with here, is not included either expressly or impliedly, and I think that the contention of Mr. O'Brien and Mr. Comyn is well founded, and that we ought to inform the magistrates that the view taken by them was not correct, and that they ought to acquit the appellant.

GIBSON, J.:—

I concur; but as this is the first time the General Dealers Act, 1903, has come up for consideration, I add a few words. Two points have been discussed: the meaning and application of the definition section; and whether section 2, on its context, makes the definition inapplicable.

Section 12, though in some respects wider, is also narrower than the title of the Act would lead one to expect. It defines "general dealer" as meaning (not including) any person dealing in certain specific articles, whether he deals in those articles only or together with second-hand goods or marine stores. The definition is exclusive, and does not apply to a person who deals only in articles other than those specified, or apparently to one whose business in second-hand or marine goods does not comprise articles of the specified classes. The horsehair here is not one of the specified articles, and there is nothing to show that this horsehair comes within the general words.

A further question was raised, which it is not necessary to decide, and as to which I express no concluded opinion. It is argued that even if this horsehair was brought within the general words, it was not within the business of a general dealer as defined, and that the words "together with second-hand goods or marine stores" were only inserted to show that the character of statutory general dealer was not affected by his trade embracing also such other goods or stores. It is urged that no license is prescribed for one dealing only in such goods or stores outside the specified particular articles, and that the offence can only be committed by a general dealer in relation to articles in respect of which a license

is prescribed. On the other hand it is contended that the title and plan of the Act show that a dealer whose trade, in addition to the described articles, extends to second-hand goods or marine stores, as to all such aggregate business comes within the operation of the Act. The definition is awkwardly worded, and, literally construed, would rather support the defendant's view; but such construction would go far to frustrate the presumed intention of the legislation, which probably was to extend the protective provisions of the Mercantile Shipping Act, 1894 (57 & 58 Vict. c. 60), sect. 538.

As the horsehair in the present case is not shown to fall within the general words, the point does not require decision. The case is the same as if bacon or timber had been the article sold.

The second question discussed was, whether the context of section 2 makes the definition inapplicable. I see nothing in the section to exclude the definition, and the same remark may apply to other sections as well. If the section is expanded by reading in the definition, the Court cannot apply the section to articles outside the trade of general dealer as defined. A general dealer may trade in goods other than those enumerated in section 12, and the purchase or sale of such goods could hardly, with propriety, be described as "a transaction in his business"—that is, business of statutory general dealer. As the case shows nothing to bring the horsehair in question within the description "second-hand goods or marine stores," whatever Parliament may have intended, the dealer is not punishable for an offence under the section.

Solicitor for the appellant: *T. J. Hunt.*
Solicitor for the respondent: *Sir P. Coll.*

J. G. T.

K. B. Div. 1905.

June 19, 29.

HALL, Appellant; O'BRIEN, Respondent (1).

General Dealers (Ireland) Act, 1903 (3 *Edw.* 7, *c.* 44), *s.* 1—*Contravention of terms of license—Dealings in public street—Dealings outside district for which licensed.*

The respondent was licensed under the General Dealers (Ireland) Act, 1903, to carry on the business of a general dealer on certain premises within the Metropolitan Police district of Dublin. He went about from house to house with a pony and cart at Howth (which is outside the metropolitan district), buying bottles and old metal (which are among the articles specified in section 12 of the Act):—

Held, that the respondent had not contravened the terms of his license, and was not guilty of any offence under the General Dealers (Ireland) Act, 1903:—

Quære: Could a license be so framed under the Act as to confine the licensee's dealings to the district in which he is licensed?

Case Stated under 20 & 21 Vict. c. 43.

At a Petty Sessions held for the Petty Sessions District of Howth, county Dublin, on the 15th May, 1905, the respondent was charged on summons on the complaint of the appellant, a sergeant in the Royal Irish Constabulary, with having, on the 10th March, 1905, at Howth, acted as a general dealer, contrary to law. The justices being of opinion, on the evidence, that the respondent had not contravened in any way the provisions of the Act, dismissed the complaint on the merits; but, on the application of the complainant, stated the present case, the material paragraph in which was as follows:—"At the hearing of the said complaint it was proved, on the part of the complainant, that defendant was going from house to house at Howth on the 10th March, 1905, with a pony and cart, purchasing bottles and old irons which he stated he was about to convey to his premises at the rear (stable) of 4 Lower Exchange-street, Dublin, on which premises he is licensed under the General Dealers (Ireland) Act, 1903, by the divisional justice to carry on the business of general dealer."

(1) Before Palles, C.B., and Johnson and Kenny, JJ.

The license followed the form given in the Rules of 21st April, 1904, made under the General Dealers (Ireland) Act, 1903, and certified that the respondent was licensed to carry on the business of a general dealer, under the provisions of the Act, on the premises, stable No. 2, rear 4 Lower Exchange-street.

Cecil Atkinson, for the appellant.

Timothy Sullivan, for the respondent.

PALLES, C.B. :— June 29.

This is an appeal upon a case stated from a decision of magistrates at Petty Sessions, dismissing a complaint made by the appellant that the defendant had acted as a "General Dealer" contrary to law.

At the hearing of the complaint it was proved, on the part of the complainant, that the defendant, who was licensed under the General Dealers (Ireland) Act, 1903, to carry on the business of a "general dealer," on certain premises within the metropolitan district of Dublin, was, on the 10th of March, 1905, going from house to house at Howth (which is outside the metropolitan district) with pony and cart, purchasing bottles and old iron, which he stated he was about to convey to his premises at 4 Lower Exchange-street, Dublin, which were his licensed premises. It was contended by the complainant that the defendant was not legally entitled to trade, except on the said premises, and that the acts proved to have been done by him at Howth amounted to a trading.

The obligation imposed upon a "general dealer" by sect. 1, sub-sect. 1, of the Act of 1903, is not to carry on his business without having in force a license under the Act; and by the same section, sub-sect. 6, the penalty now sued for is incurred if he acts as a "general dealer," without having a license under the Act, or contravenes the terms of his license. The present defendant had a license; and therefore the question is, Did he contravene its terms?

The Act does not contain any express authority to impose conditions subject to which the license may be granted; nor can I find ground for implying a right to annex any conditions, save

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HALL, *Appellant;* O'BRIEN, *Respondent.*

Palles, C.B.

two:—There is an implied power to limit the premises *to be used* in the course of the business to those specified in the license, and possibly there may also be an implied power to limit the carrying on of the business to the district of the licensing authority. It follows that using in the course of the business premises other than those specified would be a contravention of the license; and were the license framed otherwise than has been that of the defendant, possibly the carrying on of the business outside the district of the licensing authority, as the defendant has carried it on here, might also be in contravention of the license. I say "possibly," because I do not wish to decide any question not actually before us.

The question, therefore, is—Did the defendant's acts amount to a using, in the course of the business, premises other than those specified? Before I express my opinion upon this question, I desire to refer to some of the other provisions of the Act.

Sect. 2, sub-sect. 1, requires every person applying for a license to furnish, at the time of his application, a description in writing of "*his premises*, including all cellars, closets, and *other places* proposed to be used by him in the way of his business"; and by sect. 10 the name of the dealer, with the words "Licensed General Dealer," is to be printed over his premises. The Act further imposes upon the dealer obligations to do many things *on his premises*, for instance (*a*) to keep a book on his premises, in which certain particulars of each transaction of business are to be entered (sect. 2, sub-sect. 2; sect. 4, sub-sect. 1); (*b*) to keep every article purchased or received by him in his shop or other place for a certain period specified in the Act (sect. 3, sub-sect. 1); and I do not doubt that doing any of these acts upon premises other than those mentioned in his license would be such a using of the other premises as would be in contravention of the license.

Sections 8 and 9 impose certain restrictions upon the *mode* in which the licensed dealer is to carry on his business. He is not to sell to, or purchase from, anyone apparently under the age of fourteen, nor is he to sell or purchase, or have any business transactions whatsoever on Sundays or between certain specified hours on other days. Although these acts are prohibited, none of them would amount to a contravention of the license; they are subject to distinct penalties under distinct sections.

There is no similar express prohibition against *purchasing* on a public street; and at the time of the passing of the Act such a purchase by the defendant would have been lawful, although a similar *sale* by him would have been unlawful, under the express prohibition contained in the Pedlars Act.

Having regard to these provisions, I answer in the negative the question to which I have already reduced the case: Do the defendant's acts amount to the using, in the course of the business, premises other than those specified? I answer, No; because the use of the "premises" contemplated by the Act is something wholly different from the lawful use of a public street. It is a use in the nature of an *occupation* by the licensed person of premises capable of being stated in his application under section 2, and in the license; a use by keeping books, by storing articles bought, by permitting inspection by constables—a use wholly different from the lawful use by one of the public of a public street.

I should, therefore, be of opinion, were there nothing more in the case, that the acts of the defendant did not amount to a contravention of the license, and therefore that the decision of the justices was right. But there is a good deal more in the case, because, were we to arrive at any other conclusion, as a public street cannot answer the description of "premises or . . . other places," within the meaning of section 2, sub-sect. 1, and therefore cannot be a place in respect of which a license can be granted, the result of such a construction would be to *imply* a universal and absolute prohibition against any general dealer doing any act in the way of his business upon a public street. That is, we would extend by implication to purchases the prohibition against sales contained in the Pedlars Act and Hawkers Acts. Now, there are some acts which cannot be done elsewhere than on a public street, and without doing which a "general dealer" cannot carry on his trade in the ordinary way of such trade, as, for instance, delivering at the purchaser's premises goods bought from the dealer on the dealer's own premises; or carrying to the dealer's own premises goods purchased by him at the premises of the seller. Could it be contended that those acts could not be lawfully performed if the premises from and to which the goods were carried were within the district of the licensing authority? I am of opinion that it

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HALL, *Appellant*; O'BRIEN, *Respondent*.

Palles, C.B.

could not. I think that the true interpretation of the Act is that the only "premises," within the meaning of that expression in section 2, which are to be used by him in the way of his business, are those mentioned in the license; but that the lawful use by him of streets, which are not within that description, is not a breach of the provision. He does not use them in the way of his trade, merely by using them as every other member of the public is entitled to use them; and any member of the public (save where prevented by statute) is entitled, subject to well-known restrictions as to obstruction, to lawfully carry his goods along such public street, although such act may, in a sense, be an act in the way of his business.

I do not overlook the fact that the place of purchase was outside the district of the licensing authority. As to this, I desire to be taken as not expressing an opinion whether a license might not be so framed under the Act as to confine all the defendant's operations in the way of his business, including all sales and purchases, to the district in which he is licensed. But that is not the frame of the present license. It does not contain any restriction as to locality, save that as to the specified premises. There is no restriction in it which confines acts which can lawfully be done outside the specified premises to the metropolitan district.

The decision of the justices must be affirmed, with costs.

JOHNSON, J.:—

I do not differ from the judgment of the Court; but I am unable to see my way as clearly as the Lord Chief Baron to the conclusion he has expressed.

KENNY, J.:—

I concur in the conclusion arrived at by the other members of the Court. The summons charges the defendant with acting as a general dealer contrary to law. The act which is alleged to contravene the law is the purchase of bottles and old iron at a place or places other than at the premises mentioned in his license, namely, 4 Lower Exchange-street. The making of those purchases by the defendant was part of his business as a general

dealer, and were acts done by him as a general dealer; but I cannot see that he has infringed any statutory provision by so doing. The Act of 1903 is a penal one, and unless we were satisfied by reasonably plain language that the act with which he is charged is one forbidden by it, we could not hold that the conclusion arrived at by the magistrates was wrong. A penalty is incurred under the 1st section of the Act if a person acts as a general dealer without having a license, or, having a license, if he contravenes the terms of it. Power is given to the Lord Chancellor to make rules for prescribing anything which may, under the Act, be prescribed, and the form of license is one of those things. The rules that have been made, the form of the license, and the subsequent sections of the Act, all no doubt contemplate the existence of premises where the business will be carried on; but in no clause is there to be found an express prohibition against carrying on the business, or part of the business, elsewhere than on the premises. If the Legislature intended to render illegal the carrying on of the business elsewhere than on the specified premises, nothing would have been easier than to have so declared, and certain sections of the Licensing Acts would have afforded useful precedents. The Act of Parliament, as it stands, seems to me to be directed against illegality on or in connection with the premises, and does not touch a business act done—as was done here—in the public street. If the statute could be construed as being directed against the latter, then any transaction by a general dealer in the course of his business, either in the way of purchase or sale, carried out at no matter how small a distance from his premises, would be illegal. Here the defendant has a license enabling him to carry on his business at a particular place, and in my opinion he has not contravened the terms of it by the purchases made by him from door to door in the open street, which the case finds that he made.

Solicitor for the appellant: *Sir Patrick Coll.*
Solicitor for the respondent: *James A. Scott.*

J. G. T.

K. B. Div.
1904.
Nov. 10, 11, 15–18, 22.
1905.
Feb. 2.
Appeal.
June 6–8, 19.

CUNNINGHAM *v.* THE FRONTIER S.S. CO. (1).
TOWNLEY *v.* SAME.
MOSTYN *v.* SAME.
LENNON *v.* SAME.

Ship—Duty of owners towards seamen—Seaworthiness—Negligence in loading cargo—Maize in bulk—List on ship in a port during the voyage—Shifting of cargo—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 458.

The C., a ship belonging to the defendants, was chartered to carry a cargo of maize in bulk from Liverpool to Galway, and by the charter-party the charterers were to supply sufficient bags for stowage of the cargo, if required. The cargo, 632 tons, was loaded in bulk under the direction of a stevedore, and 111 bags were placed in coamings under the forward hatch. The C. left Liverpool on the 12th June, and arrived in Lough Swilly at 6 a.m. on the 13th, having had fine weather all the way. It was found at Lough Swilly that the ship had a list to port, as to the extent of which the evidence varied from 5 to 20 degrees. Nothing was done to correct the list, and she left about 8 in the evening and proceeded on her voyage. The list increased, and a gale of wind having sprung up, the vessel foundered. Seven of the crew were drowned. In an action under Lord Campbell's Act the jury found that all the necessary and reasonable precautions had not been taken to prevent the cargo from shifting as regards bagging and stowage, and that the vessel became unseaworthy for the voyage by reason of a list existing when she was in Lough Swilly: that the list was caused by the cargo shifting by reason of the omission of proper precautions:—

Held (by Andrews and Kenny, JJ., *diss.* Boyd, J., and by the Court of Appeal), that there was evidence to sustain the verdict that the cargo was not properly loaded at Liverpool, and also that there was evidence to show that the ship was not seaworthy when she left Lough Swilly.

NEW TRIAL MOTION.

The action, which was tried before Mr. Justice Gibson and a special jury of the city of Dublin during the Trinity Sittings, 1903, was brought under Lord Campbell's Act for the death of four sailors on board the s.s. "Cloughmore," and represented four separate actions which had been consolidated. The statement of

(1) In the King's Bench Division, before ANDREWS, BOYD, and KENNY, JJ.

claim alleged that necessary and reasonable precautions were not taken to secure the cargo of the "Cloughmore" against shifting, or for the proper stowage and security thereof, by reason whereof the said cargo shifted; and, in consequence thereof, the said vessel was lost, and the deaths of the sailors mentioned occasioned; that it was by the negligence and breach of duty of the defendants that such precautions were not taken; that it was by the negligence and default of the defendants that the said vessel was in an unseaworthy condition and unfit for the purpose of the voyage, as the defendants well knew, or ought to have known, but of which the deceased members of the crew were ignorant; and that the contract of service between the defendants and the deceased sailors, by reason of the 458th section of the Merchant Shipping Act of 1894 (1), implied an obligation on the defendants and the master of the vessel, and every agent charged with the loading of the said vessel or the preparing of the said vessel for sea, or the sending of the said vessel to sea, to use all reasonable means to insure the seaworthiness of the said vessel for the voyage at the time the voyage commenced, and to keep her in a seaworthy condition for the voyage, and a breach of this condition, by reason whereof the vessel foundered, was alleged.

The defence consisted of traverses of the above allegations.

The s.s. "Cloughmore," a coasting-vessel owned by the defendants, left Liverpool for Galway on the 12th June, 1902, laden with a cargo of 632 tons of maize, but without shifting boards, the vessel being then in proper trim. She arrived at Lough Swilly at 6 a.m. on the 13th June, and anchored one mile below Rathmullen, in order, as the captain alleged, to have a leak in the condensing tube repaired. She left Lough Swilly at 8.30 the same evening, with a considerable list to port,

(1) 57 & 58 Vict. c. 60, s. 458 (1): In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, . . . there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship that the owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing of the ship for sea, or the sending of the ship to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the voyage.

K. B. Div. 1904.

CUNNINGHAM v. FRONTIER S.S. Co.

and subsequently foundered in heavy weather fourteen miles west of Tory Island, and the four sailors in respect of whose deaths this action was brought lost their lives.

The evidence given at the trial, so far as necessary for the purposes of the report, is fully stated in the judgments delivered by the Divisional Court.

At the close of the plaintiffs' case counsel for the defendants called for a direction.

The following are the questions which were left to the jury, with their answers :—

1. Were all necessary and reasonable precautions taken to prevent the grain cargo from shifting : (*a*) As regards shifting-boards ?—Without answering this, we recommend that there should be shifting-boards. (*b*) As regards bagging ?—No. (*c*) As regards stowage ?—No. (The stowage was improper by reason of improper bagging.)

2. Did the vessel become unseaworthy for the voyage by reason of a list existing when she was in Lough Swilly ?—*Answer*, Yes.

3. If "Yes": (*a*) Was such list caused by cargo shifting ?—*Answer*, Yes. (*b*) If it was so caused, did the cargo shift by reason of omission of precautions in Question 1 ?—*Answer*, Yes.

4. Could and ought the master to have corrected the list before resuming the voyage ?—*Answer*, Yes.

5. Was the loss of the vessel caused by—(*a*) Omission of precautions mentioned in Question 1 ?—*Answer*, Yes. (*b*) Default of the master in not correcting the list in Lough Swilly ?—*Answer*, Yes.

6. Was Townley, the mate, responsible for the omission of precautions in Question 1 ?—*Answer*, No.

7. Did Townley, Cunningham, Mostyn, and Lennon, or some and which of them, accept the risk arising from—(*a*) The cargo shifting in the vessel ? —*Answer*, They did not. (*b*) The list remaining uncorrected ?—*Answer*, They did not.

8. (1) To what damages (if any) are the widow and four children of George Townley entitled for pecuniary loss from his death ?—*Answer*, £350. (2) To what damages (if any) are the widow and four children of Thomas Cunningham entitled for like pecuniary loss ?—*Answer*, £220. (3) To what damages (if any) are Robert Mostyn and his wife entitled for pecuniary loss caused by the death of Charles Mostyn, aged eighteen ?—*Answer*, £40. (4) To what damages (if any) are Peter Lennon and his wife entitled for pecuniary loss caused by the death of Michael Lennon, aged twenty-four ?—*Answer*, £40.

The jury apportioned the damages, and the learned Judge entered the verdict and gave judgment for the plaintiffs.

Serjeant Dodd, K.C., T. L. O'Shaughnessy, K.C., M. J. Dunn, and *Cusack*, for the defendants, moved to set aside the verdict and judgment, and to enter same for defendants.

Denis S. Henry, K.C., T. M. Healy, K.C., and *J. Donaldson,* for the plaintiffs.

The arguments were the same as those in the Court of Appeal, reported *infra*.

1905. Feb. 2.

ANDREWS, J.:—

These four consolidated actions were brought by the several plaintiffs, under Lord Campbell's Act, against the defendants, who were the owners of the steamship "Cloughmore," to recover damages sustained by the deaths of Thomas Cunningham, George Townley, Charles Mostyn, and Michael Lennon, who were employed by the defendants as members of the ship's crew, and whose deaths were alleged by the plaintiffs to have been caused by the negligence and breach of duty of the defendants and their servants, by reason of which the "Cloughmore" foundered on a voyage from Liverpool to Galway with a cargo of maize, and these four members of the crew were drowned. At the trial of these actions the connected findings of the jury were that all necessary and reasonable precautions were not taken to prevent the grain cargo from shifting, inasmuch as the stowage was improper by reason of want of proper bagging; and that the vessel became unseaworthy for the voyage by reason of a list existing when she was in Lough Swilly, which was caused by the cargo shifting, which it did by reason of the omission of such precautions; and that the master could and ought to have corrected the list before proceeding on the voyage; and that the loss of the vessel was caused by the omission of such precautions and the default of the master in not correcting the list in Lough Swilly; and that Townley, the mate, was not responsible for the omission of such precautions; and that Townley, Cunningham, Mostyn, and Lennon did not accept the risk arising from the cargo shifting, or from the list remaining uncorrected.

In my opinion there was sufficient evidence to support these findings; and if so, the question is, whether, upon these findings,

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and any legitimate inferences of fact which may be drawn by the Court, the defendants can be held responsible in damages to the representatives of the members of the crew who so lost their lives?

The "Cloughmore" left Liverpool with a cargo of maize (loaded there), and bound for Galway, on the 12th of June, 1902, under a charter-party, dated the 9th of June, 1902, made by the agents of the ship with W. R. Barrett, merchant, by which the ship was to proceed to Liverpool, and load a full cargo of maize in bulk, say about 620 tons (the charterer to provide sufficient sacks for stowage if required), which the merchant bound himself to ship on board the vessel, not exceeding what she could reasonably stow and carry above her tackle, apparel, provisions, and furniture, and being so loaded should forthwith proceed to Galway, or so near thereto as she might safely get, and deliver the cargo on payment of the specified freight. The ship reached Lough Swilly, on her voyage, on the 13th of June, at 6 o'clock, a.m., and left it at 8.30 o'clock, p.m., and on the 14th of June foundered in a gale when about fourteen miles west of Tory Island. A stevedore named Davis, who had acted for some years for the defendants, acted for the "Cloughmore" in the stowing of the cargo on this occasion. The meaning of the finding by the jury that the stowage was improper "by reason of want of proper bagging" obviously was that enough of the cargo had not been stowed in sacks—sufficient stowage in sacks being manifestly in their opinion, upon the evidence, a reasonable precaution to prevent the cargo from shifting.

The learned Judge before whom the actions were tried reports that he invited counsel on both sides to consider the questions which were put to the jury, and on which their findings were given. Counsel for the defendants declined to ask any question whatever to be put to the jury, and the learned Judge was not asked to put any other or different questions. The contention of the defendants' counsel was that there was no evidence to sustain a verdict for the plaintiffs. There was no objection to the Judge's charge, save what was involved in the requisition of the defendants' counsel that he should direct a verdict for the defendants.

The four persons above referred to who lost their lives in consequence of the foundering of the ship were seamen thereof, employed as such by the defendants, the owners of the ship. By the 458th section of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), it is enacted that "in every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof . . . there shall be implied, notwithstanding any agreement to the contrary, an obligation *on the owner of the ship* that the owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing of the ship for sea, or the sending of the ship to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage, at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the voyage."

It will be observed that the statutory obligation thus imposed on the owner in every such contract of service is not merely that he himself shall use all reasonable means to insure and preserve the seaworthiness of the ship, both at the commencement of and during the voyage, but that the master, and every agent charged with the loading of the ship, or preparing the ship for, or sending the ship to, sea, shall also use all such reasonable means; and the defendants were under this obligation to each of the four seamen who lost their lives.

The definition of the seaworthiness of a vessel given by Baron Parke in the case of *Dixon* v. *Sadler* (1) was "that she shall be in a fit state as to repairs, equipments, and crew, and *in all other respects*, to encounter the ordinary perils of the voyage." This definition was cited, and apparently with approval, by Lord Herschell (Lord Chancellor) in giving judgment in the House of Lords in the case of *Hedley* v. *The Pinkney & Sons Steamship Company, Limited* (2), upon the construction of the words "seaworthy for the voyage," in the 5th section of the Merchant Shipping Act, 1876, corresponding with the 458th section of the present Act of 1894. The failure in *Hedley's Case* (2) to have stanchions and rails, which were on board, put in position so as to raise the bulwarks at a particular place to the proper height, whereby during

(1) 5 M. & W. 405. (2) [1894] A. C. 222.

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a storm a seaman, in a lurch of the vessel, was cast overboard at this place and drowned, although evidence of negligence on the part of the master, was held not to render the ship "unseaworthy"; but the present is a different case. In *Steel* v. *The State Line Steamship Company* (1), in which there was an implied engagement to supply a seaworthy ship, and the question arose whether a vessel which started on her voyage with an insufficiently-fastened port-hole, through which the sea burst and damaged the cargo, was in a seaworthy condition at the commencement of her voyage, Lord Blackburn expressed his opinion as follows:—namely, that if the port was in a place where it would in practice be left open from time to time, but was capable of being speedily shut if occasion required, the vessel could not be said to be unfit to encounter the perils of the voyage; but that if the port was left unfastened, so that when any ordinary weather came on, and the sea washed as high as the port, it would be sure to give way, and the water come in, unless something more was done; if in the inside the wheat (which was the cargo) had been piled up so high against it, and covered it so that no one would ever see whether it had been so left or not, and so that if it had been found out, or thought of, it would have required a great deal of time, and trouble (time above all) to remove the cargo, and get at it, and fasten it; if that was found to be the case, and it was found that at the time of sailing it was in that state, he could hardly imagine any jury finding anything else than that a ship which sailed in that state did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the Atlantic.

I think there can be no doubt that improper stowage of the cargo which affects the safety or stability of the ship may render her "unseaworthy" both at the commencement of the voyage and during the voyage. In the case of *Kopitoff* v. *Wilson* (2), in which there was an implied warranty by the owner that his vessel was seaworthy, an action was brought to recover damages for the loss of armour plates which had been stowed by the servants of the defendants on board their ship, and during rough weather one plate broke loose, and went through the side of the ship which, in

(1) 3 A. C. 72. (2) 1 Q. B. D. 377.

consequence, was lost with the cargo. It was not disputed that the ship was in herself a good ship. At the trial the judge (Blackburn, J.) told the jury, as a matter of law, that the shipowner warranted the fitness of his ship when she sailed, and he left to them two questions:—(1) Whether the vessel at the time of sailing was in a state, as regards the stowing and receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season? and, if she was not in a fit state—(2) Whether the loss that happened was caused by that unfitness? The verdict was found and entered for the plaintiff, and leave was reserved to the defendants to move to enter a nonsuit. A rule was obtained accordingly, and also for a new trial on the ground of misdirection. The armour plates were stored on the top of railway iron, and secured by wooden shores. There was a conflict of evidence as to whether this was or was not a proper mode of stowing them. It was contended for the plaintiff that this mode of stowing the plates made the ship unseaworthy for the voyage. The jury answered the first question in the negative, and the second in the affirmative; and the findings were justified by the evidence. The direction to the jury was held to be right. The questions put to the jury were in no way objected to, and the rule was discharged, leaving the verdict for the plaintiff undisturbed. The recent case of *The Master and Owners of the s.s. City of Lincoln* v. *Smith* (1) shows that a ship, in other respects seaworthy, may be rendered "unseaworthy," if so laden as to be top-heavy, with insufficient dead weight in her bottom to counteract the weight above the waterline; and I think it clear that a ship may be rendered "unseaworthy" by a grain cargo being so stowed as to shift and affect the stability of the ship by causing a dangerous list. I shall now, as briefly as I possibly can, refer to the evidence, in so far as it comprised what the jury were at liberty to rely on in support of their findings. There was conflicting evidence, and some parts of the evidence of some of the material witnesses were not apparently in accordance with other parts of the evidence of the same witnesses. All this, however, was for the jury, and I only propose to refer to evidence on which the jury

(1) [1904] A. C. 250.

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were at liberty to act—if they so thought fit—in arriving at their findings.

The master (Captain M'Clenaghan), who was called by the defendants, said: "We had fine weather to Lough Swilly. There was nothing to cause the cargo to shift. The morning we reached Lough Swilly she had a slight list—nothing unusual." [I think it was open to the jury to consider on the evidence whether this list was in reality attributable to insecure stowage, though a different explanation of it was offered.] "We anchored a mile below Rathmullen. I noticed list at 3 o'clock, a.m., when I was on deck. It was going on gradually, and was very slight. It was caused by burning more coal starboard than port. We could equalize by burning more from port. I gave directions to chief engineer to burn coal off port side to straighten her. . . . When leaving, the list was about same as when we came in; left Lough Swilly about 8.30 p.m.; wind blowing strong; nothing serious threatened. There was no danger from the list; no complaint was made by anyone." [But whatever caused it, the list remained uncorrected.] "The list increased from the wind blowing on starboard; she shipped heavy sea, behaved well. I was fourteen miles west of Tory Island when vessel foundered. I noticed nothing unusual till twenty minutes before she foundered—she had then shipped a heavy sea, and listed heavily to port. I put her head up to sea, she did not straighten up; the reason was the cargo shifted." In cross-examination he said: "I took no steps to find out the cause of the list. . . . I saw her with greater list coming from Dunkirk with cargo of sugar in bags. I knew grain in bulk was dangerous. She listed same as any other vessel; every vessel at times has list for various reasons, *e.g.* consumption of coal. We would burn between six and seven tons coming to Lough Swilly. . . . I could not have corrected the list; the vessel was full of grain; I could not do it in reason, that is, without discharging. . . . I had 111 bags on board. . . . The sea from Liverpool to Lough Swilly was like a mill-pond . . . I was on deck with mate quarter to 4 o'clock when vessel shipped heavy sea and took a big list to port, and before she had time to recover herself another sea struck her. . . . The list was 45 degrees. . . . The vessel filled, she turned on her port side, and went down stern first. The cargo gave her list; the

sea hit the ship, gave her list; the ship was prevented from righting by the cargo shifting, and the weight of water on her deck. . . . Three degrees of list would be caused by the coal. . . . Every cargo should have shifting-boards, but it is not the custom. . . . If there were shifting-boards, this accident probably would not have occurred. It would be wrong to go to sea with a list of 18 degrees. . . . 8 degrees of a list would be dangerous. With such list I would not have gone to sea." Re-examined:—"It is only matter of speculation as to cargo shifting." [There was no evidence that although the ship met heavy seas there was any weather which could not have been reasonably anticipated.]

In his deposition at the Board of Trade inquiry, which was read at the trial, the master (M'Clenaghan) said:—"In my opinion the shifting of the cargo caused the vessel to founder. . . . I was afraid the cargo might shift if I did not alter the ship's course, because grain cargoes are very liable to shift in a heavy beam sea . . ." [It was open to the jury, therefore, to consider whether adequate precautions had been taken to prevent the cargo from shifting in a heavy beam sea, which any ship might encounter on such a voyage.] "I had no premonition of danger until a quarter of an hour before the ship went down, except the liability of the grain cargo to shift. . . . I believe it shifted. . . . There was a very slight list before we entered Lough Swilly, but it did not indicate any shifting of the cargo." [It was open to the jury on the evidence to consider whether the witness was correct in this.] "I formed no opinion as to the cause of that list. The weather had been fine up to then. The list was caused by more coal being burned off one side than the other. I told the engineer in Lough Swilly to burn more coal off the port than the starboard side. . . ." [But the list continued and increased.] "I was twelve or fourteen hours in Lough Swilly. I was aware the cargo was likely to shift. I did not take off the hatches and examine the cargo, as I had often seen this vessel with a list before, from more bunkers being burned off one side than the other. . . ." [He did not state what kind of cargo he had, or how it was stowed on these occasions.] "The 'Cloughmore' sailed about three times from Liverpool. This was the first time this stevedore (Davis) stowed grain in the 'Cloughmore.'"

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C. Neill (called by the plaintiffs) said :—" I was chief officer, coast guards, Rathmullen. I retired in April, 1903; 13th June, about 8 o'clock, a.m., observed steamer anchored . . . one mile north of Rathmullen. . . . She had a heavy list to port, I would say 18 to 22 degrees. I would consider it very dangerous with a cargo of corn, but not with a cargo of coal." Cross-examined :—" Grain, like sand in a glass, is more liable to shift than coal. It is bound to settle down, even if packed close to coamings." Re-examined :—" I was forty years at sea. I had no experience of grain cargoes at sea."

R. Fowler, chief boatman at Rathmullen (called by the plaintiffs), said :—" 13th June, went to the 'Cloughmore,' between 8 and 9 o'clock. . . . She had a list to port which made it awkward to walk on the deck. . . . It was more of a list than is usual with this class of steamer." Cross-examined :—" If they were fools enough to take all the coal out of the starboard bunker, that would cause the list. . . . I can't say whether list was dangerous."

E. A. Davis, a stevedore at Liverpool (called by the plaintiffs), said :—" Acted for some years for defendants; acted for 'Cloughmore,' June, 1902. . . . She had no shifting-boards; coasting-steamers do not carry them. . . . The coamings were full. They act as shifting-boards acrosss the hatch. This ship did not require shifting-boards." [His deposition handed to witness, and passage read—" I think this ship and every other ship would be better with shifting-boards—I advised shifting-boards."] " That must be true if I swore it. . . . If the coamings are full up, shifting-boards are not necessary. . . . I believe this cargo settled down. It would shift a little bit when it settled. . . . 100 tons in bags would help against shifting. If all in sacks, that would help. . . . I did put in some bags—what I thought necessary. I did not see them put in, Meaher did. . . . I would put bags for safety on top of cargo—240 lb. in each bag—111 bags would be desirable here. I often loaded her before without bags. I used my own judgment." Cross-examined :—" This grain was to be loaded in bulk. I could have had as many bags as I wanted from the charterer. I could have used all the bags. They are put on the top to steady. . . . I would put half cargo in sacks if I wanted to secure properly, but then this was to be in bulk—any steamer safer with shifting-

boards; if loaded with sacks altogether, it would not fill her within 100 tons of her mark; 620 tons could not have been carried in bags. . . . This cargo was properly stowed in accordance with custom. It was to be stowed to the satisfaction of the mate. My foreman and the mate had to load between themselves. The loading was to the mutual satisfaction of both. My foreman was in charge for me. The mate was in charge for the ship. Sacks only put forward. They are never put in after hatch."

The deposition of this witness (Davis) was also read at the trial, and he stated—"I was the stevedore of the 'Cloughmore.' . . . I was the standing stevedore of this Company (the defendants); I went on board the 'Cloughmore' first three and a half hours before she finished loading—5.15 p.m., 12th June last. . . . I remained on her till 6.20 p.m." [Such only was his personal supervision of the loading.] "She was finished, I believe, about 8.20 p.m. . . . I do not know what amount of bunker coal she had in. . . . The grain was brought to the ship in bags; I did not see the 111 sacks that they say were in the ship. . . . The packing of the sacks was done after I left. . . . Occasionally we put sacks in a vessel to act as bulk-heads, and make the boat safer. There was no occasion to keep this cargo steady. The bags were to keep her down by the stern—so I directed them to be placed forward, as the grain takes up more room in bags than in bulk; 111 bags would take up as much room in bags as 150 bags in bulk. I only put bags in this steamer on one previous occasion. I put bags on her once before when she was loaded with wheat. I had no special instructions about bags in this case from Mr. Fisher (the owners' agent). I had a free hand from Mr. Fisher to do as I liked with his vessels' cargoes when stowing them. . . . My own judgment suggested I should put in bags this time. I had no conversation with the captain about it, but my foreman spoke to the mate about it. My foreman and the mate are both dead. I suggested to my foreman it might be necessary to trim the 'Cloughmore' with bags. . . . The cargo was well and properly stowed. I believe the cargo of the 'Cloughmore' shifted. . . . All cargoes of grain, after they have been in a warehouse, or a hold, or a sack, become small through being knocked about a bit—all cargoes are liable to shift. . . . I think the shifting of a cargo is no reflection

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on a stevedore. I heard Mr. Fisher swear the captain did not know why this ship sank. It is my impression the cargo shifted on the 'Cloughmore.' . . . Till 5 p.m. I was never into the hold of this ship on this occasion. . . . The sacks were put loosely on the grain. There was no occasion to put sacks in her at all. . . . I believe this cargo settled down, and then shifted. I would put half this cargo in sacks if I wanted to secure it properly . . . I think this cargo was properly stowed, though liable to sink and settle down. It is my opinion that if 100 tons were put in bags and placed on boards, the cargo would have been less liable to shift. I had the stowing of this cargo in my own hands. . . . I used sacks with wheat, because wheat is heavier than maize, and takes up less cubic space than maize. I put it in sacks because the vessel would not fill up with wheat. Supposing I put into the vessel 100 tons of this cargo, in bags, I could not get her full." [So that safety may have been thought to have been sacrificed to getting in a full cargo.] "If loaded with sacks altogether, it would not fill her to within 100 tons of her mark. I think this ship and every other ship would have been better with shifting-boards. I advise shifting-boards."

Captain Quirk, a master mariner (called by the plaintiffs), said—"Read description of this vessel. List beyond 5 or 7 degrees would be dangerous with her. The list described by Neill would be very dangerous. A list making it awkward to walk on deck over 5 or 7 degrees would be dangerous. The captain could have trimmed the grain to the high side with shovels, if there was an opportunity of getting down to the forehold—that is, if it was not full. Otherwise you should discharge the cargo wholly or in part." [There was no evidence that this could not have been done.] . . . "A vessel with coamings full to one foot of top has listed with me with coal cargo. I took her to port and untrimmed her. North coast of Ireland is dangerous."

Maguire, the fireman in the engine room aft (called by the defendants), stated:—"I noticed list in evening, about 2 o'clock, also in Lough Swilly. It got worse at 2 o'clock; got gradually worse after leaving Lough Swilly. Heavy list about 3." Cross-examined:—"I did not trim the coal on the 12th. I do not remember any directions to get coal from port bunker. We fired

from both bunkers. The coal came freely out of each. I do not know that there was better coal on starboard side. . . . She used 8 tons coming to Lough Swilly."

Meaher (called by the defendants) stated:—"I was foreman first day of loading at Liverpool; was second foreman second day. . . . The grain was brought in sacks, 240 lb. each . . . It was flat maize. . . . There were no ties on the mouths of the sacks when brought. I was present when loading was completed. We loaded the same as any other boat. The hold was filled full. We could have as many bags as we wanted. Two loads of sacks were used, 65 or 55 in each load. These latter sacks were full and tied. . . . We put them in the coaming of the fore-hatch. They were not below the coamings; they were on top of the corn next the hatch when battened down. The corn was level up to deck when we put the bags in coaming . . . no bags were under deck. The maize was up to top of the coamings of aft- or main-hatch. There was no room for half a sack there. Could not fill after-hatch better. Flat maize is large and light." Juror asks: "Why put bags only in fore-hatch? Answer, "To avoid loss of room, we put in the bags. It would not be full without the assistance of the bags. These compartments only went down to the deck level. They did not go down to the hold. . . . There were plenty of sacks if wanted." Cross-examined:—"The hatch would be 10 feet broad, length 30 feet. Each section of compartment was 10 feet. . . . No other bags were put in, but those in fore part of fore-hatch. . . . The mate was, during the day, two or three times in the hold."

As I have already said, there was conflicting evidence which I have not quoted; but it was for the jury. In my opinion, the evidence I have referred to, however, was sufficient, if the jury thought fit to act on it (as they appear to have done), to support their findings, and their findings, in my opinion, amount to this, that the obligation imposed on the defendants by the 458th section of the Merchant Shipping Act was not performed. As regards Townley, the mate, I think it was open to the jury upon the evidence to come to the conclusion that the stowage was taken out of his hands and given over to Davis, the stevedore, although there was evidence the other way. The leaving Lough Swilly, however, with the list uncorrected was the act of the master, and

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the mate was in no way involved in it. I think it legitimate for the Court to draw, if necessary, the inferences of fact (which I do) that the vessel, by reason of insecure stowage of the cargo, was not reasonably fit to encounter on her voyage such weather as might reasonably have been expected, and which she met with, and that the deaths of the four seamen who lost their lives were occasioned by the non-fulfilment of the obligation imposed on the owners by the 458th section, by reason of which the ship foundered. The statutory obligation in question could not be shifted by the defendants from themselves to any other person or persons. Its existence gets rid of any suggestion of non-liability of the owners by reason of the foundering of the vessel having been occasioned by the negligence of a fellow-servant, or fellow-servants, of the seamen who lost their lives while engaged in a common employment with them, and the defendants did not even ask that any such question should be left to the jury. I rest my judgment on the non-performance of the obligation imposed upon the defendants by the 458th section of the Merchant Shipping Act. Different considerations would apply to the 452nd section, which I do not think it necessary to discuss. The result, in my opinion, is that the verdicts for the several plaintiffs (the amounts of which are not objected to) ought not to be disturbed, and that the defendants' motion should be refused with costs.

BOYD, J.:—

[His Lordship referred to the pleadings, and continued:—]

The only witnesses examined for the plaintiffs at the hearing in reference to the facts in dispute were C. Neill, who was chief officer of coastguards at Rathmullen, in Lough Swilly, into which port the said vessel put on the morning of the 13th June, 1902; and he deposed that when he saw her at about 8 o'clock, a.m., on that day, she had a heavy list to port, which he estimated at from 18 to 22 degrees, and that he would consider that list very dangerous with a cargo of grain, but not with a cargo of coal, and that grain is liable to settle down even if packed close up to coamings. He admitted he had no experience of grain cargoes at sea.

As regards the list alleged by this witness, I consider his

evidence wholly unreliable, as the vessel had only one foot of free-board when loaded, and with such a list as 18 to 22 degrees must necessarily have had a large portion of her deck under water; and no one alleges that it was so.

R. Fowler, chief boatman at Rathmullen, was the next witness, and stated he boarded the vessel at Rathmullen, and that the list made it awkward to walk on the deck, and that he did not report it to his chief officer, as he was bound to do, if he considered the list dangerous.

E. A. Davis, the stevedore who loaded the vessel at Liverpool, was the next witness for the plaintiffs, and stated that he had loaded this vessel many times before, and that she had no shifting-boards, that coasting-steamers, such as she was, do not carry them—that boards would not make this steamer any more safe. That her coamings were three or four feet high; that they were full up, and they act as feeders for the hold. He also stated that he loaded more grain cargoes in coasting-steamers than any two or even ten men in Liverpool, and that he did the bulk of the grain trade in Liverpool, and that he averaged twenty steamers a week, but not all grain; that he could have had as many bags as he wanted, and that they are put on the top to steady the cargo at the coamings of hatch, and if the coamings are full, they would fill the belly if there was a sinking of the cargo—that this cargo was properly stowed in accordance with custom; that he put in some bags—what he thought necessary. He also proved that shifting-boards are used in liners on coming from the River Plate with many thousand tons on board. He knew the ship was going to Galway, and it was a foul passage; that boards would not make this steamer any more safe; her coamings were three or four feet high; they act as feeders for the hold, and the coamings were full up; they act as shifting-boards across the hatch. This ship did not require shifting-boards. Certain portions of the depositions made by this witness, dated 8th August, 1902, were read by counsel, to which I shall refer hereafter. He further stated that he believed this cargo settled down, and that it would shift a little bit when it settled; he never yet saw shifting-boards used in a coaster. He did put in some bags, what he thought necessary; he often loaded her before without bags, and he used his own judgment, and that

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he would put bags in this steamer forward. The mate was responsible for the stowage. The grain was to be loaded in bulk; and he could have had as many bags as he wanted from the charterer. Townley (the mate) was responsible for the cargo. It was to be stowed to his satisfaction; that his (Davis) foreman was in charge for him, and the mate in charge for the ship. Sacks are only put forward; they are never put in after-hatch.

The only other witness for the plaintiffs was Captain Quirk, but he mostly confined his evidence to what he would have done after the list appeared. He, however, stated that in most cases the hold under the fore-hatch is not full, and stated that he never heard of shifting-boards being used in coasting-vessels.

The portion of his deposition to which the master was referred was merely his replies to certain questions which were put to him. The form in which the questions were put is not given; but from his replies, it is manifest that they were merely hypothetical questions—for instance, he stated that he would put half of this cargo in sacks if he wanted to secure it properly; and if the ship had shifting-boards, it would make it more safe. These were merely replies to abstract questions, for he states distinctly in the other portions of his deposition that it is not customary to put sacks in these steamers, and there was no occasion to put them in her at all; and that though he thought every ship would be better with shifting-boards, they are never used in coasters; and Captain Quirk corroborated him as to this.

The only negligence suggested by the plaintiffs in the evidence was that the vessel was allowed to proceed on her voyage from Rathmullen with the list on her which she had at that port uncorrected, and also that the stevedore was guilty of negligence in the stowage of the cargo by reason of not using bags or sufficient bags, and that the defendants were negligent in not having shifting-boards on the said vessel.

At the close of the plaintiffs' case Mr. Serjeant Dodd and Mr. O'Shaughnessy, on behalf of the defendants, asked for a direction in their favour, on the grounds that there was no evidence that the vessel was unseaworthy, nor was there any evidence that there was any want of proper precautions to prevent the cargo shifting, and there was no evidence of the actual

cause of the loss of the vessel, and on other grounds—and they referred to *Hedley* v. *Pinkney & Sons Steamship Co., Limited* (1).

I have referred to the evidence given on behalf of the plaintiffs in order to see what evidence there was to support their case, as set forth in the statement of claim. There are three distinct causes of action, and three only mentioned therein—(1) negligence and breach of duty by the defendants in the stowage of the cargo of grain on board the "Cloughmore," by not taking reasonable and proper precautions to secure the said cargo against shifting, or for the proper stowage and security of said cargo; (2) that the said vessel was, by the negligence and default of the defendants, in an unsafe and unseaworthy condition, and unfit for the purpose of the voyage, as the defendants well knew or ought to have known, but of which the parties whom the plaintiffs represented were ignorant, whereby the deaths of the said parties were occasioned; and (3) that the defendants, in violation of the term implied in the contract of service between the deceased men and the defendants, pursuant to the 458th section of the Merchant Shipping Act, 1894, did not use all reasonable means to insure the seaworthiness of the said ship for the voyage, and to keep her in a seaworthy condition during the voyage, by reason whereof she foundered.

The first of the aforesaid causes of action is founded on the provisions of sect. 452 of the Merchant Shipping Act, 1894; and the second and third on the provisions of sect. 458.

The evidence by which the plaintiffs at the trial sought to sustain these causes of action was, in my opinion, very meagre and unsatisfactory; and I do not find any reasonable evidence given on which the case should have been left by the judge to the jury. In the case of *Jewell* v. *Parr* (2) Maule, J., states (p. 915):—"I also think there was no evidence to go to the jury—that is to say, no evidence sufficiently pointing to one conclusion in preference to the other, to warrant them in finding either of the two material allegations in the plea." And again (p. 916):—"When we say that there is no evidence to go to the jury, we do not mean that there is literally none, but that there is

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none which ought reasonably to satisfy a jury that the fact sought to be proved is established." In *Toomey* v. *London & Brighton Railway Co.* (1) Williams, J., expresses the same principle:—"It is not enough to say there was some evidence . . . a scintilla of evidence . . . clearly would not justify the Judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude that there was negligence." In *Daniel* v. *The Metropolitan Railway Company* (2) Willes, J., states:—"It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution, which the defendants might and ought to have resorted to; and I go further, and say that the plaintiff should also show with reasonable certainty what particular precaution should have been taken."

In *Crafter* v. *The Metropolitan Railway Co.* (3) Erle, C.J., in his judgment (p. 303), says:—"It was said that brass was an improper thing for the surface of the stairs, and that lead would be better, because less slippery; but in my judgment that expression of opinion on the part of the witnesses affords no ground for holding the defendants liable"; and Montague-Smith, J., in his judgment (p. 304), states:—"The line must be drawn in these cases between suggestions of possible precautions, and evidence of actual negligence such as ought reasonably and properly to be left to a jury." In *Giblin* v. *M'Mullen* (4) the same principle is laid down, and several cases referred to as supporting it.

In the case of *Davis* v. *Hardy* (5) Abbott, C.J. (p. 231), states:—"But where a witness is unimpeached in his general character, and uncontradicted by testimony on the other side, and there is no want of probability in the facts which he relates, I think that a judge is not bound to leave his credit to the jury, but to consider the facts he states as proved, and to act upon them accordingly." And Bayley, J., says:—"If there is nothing in the demeanour of a witness, or in the story he tells, to impeach his credit, and he is not contradicted by testimony on the other

(1) 3 C. B. (N. S.) at p. 150.
(2) L. R. 3 C. P. at p. 222.
(3) L. R. 1 C. P. 300.
(4) L. R. 2 P. C. at p. 331.
(5) 6 B. & C. 225.

side, it is not a case for a jury to deliberate upon. If the case had been submitted to the jury, and they had disbelieved this witness, I think that we should have been bound to send the case down to a new trial." In an American case (1), referred to in Beven on Negligence, 2nd ed., at p. 762, the law is thus stated :— "Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same; and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed."

In "*The Khedive*" (2), Lord Blackburn, approving of the judgment of Brett, L.J. (p. 891), says :—"A man may not do the right thing, nay, may even do the wrong thing, and yet not be guilty of neglect of his duty, which is not absolutely to do right at all events, but only to take reasonable care, and use reasonable skill."

Now, in the present case what facts were established in evidence to warrant the Judge leaving the case to the jury?

The only witness examined by the plaintiff as to the stowage of the cargo was Davis, the stevedore, and the substance and fair construction of the entire of his evidence was that the cargo was shipped by him in the usual and accustomed manner; that he was an experienced and competent man, and did the bulk of the grain trade in Liverpool—that he had loaded more grain cargoes in coasting-steamers than any two or even ten men in Liverpool; that he had loaded this vessel many times before; that on this occasion her loading occupied two days and overtime, though he had frequently loaded her in one day; the loading was carefully done, there being ample time to finish the work properly. The

(1) 136 Pa. St. 618, at 626; 20 Am. St. R. 944. (2) 5 App. Cas. 876.

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coamings were from three to four feet high, and hold about sixty tons, and act as feeders to the hold if the cargo settles down; that sacks are only put into the fore-hatch for the purpose of trimming the vessel, and 111 sacks were so used on this occasion. He also proved that shifting-boards are never used in coasting-steamers, and in this he was corroborated by Captain Quirk, the only other witness examined on the question of negligence. It was quite competent for the plaintiff to have produced and examined expert witnesses as to the proper mode of stowing cargoes of grain on coasting-vessels, and to state their opinion as to whether Davis's evidence was correct or otherwise. No such evidence was produced, and I fail to see, in the absence of any contradictory evidence, on what reasonable grounds the case was allowed to go to the jury on Davis's evidence.

It may be contended that as, after the vessel had left Liverpool, she developed a dangerous list, and that she put into Rathmullen, and was thence again put to sea on her voyage without means having been taken to correct that list, this was evidence of negligence on his part. There is no specific mention of any such allegation of negligence in the statement of claim; and in the 7th paragraph the negligence and default relied on is expressly stated to have been to the knowledge of the defendants, which could not refer to matters which occurred subsequent to the vessel leaving Liverpool, and no proof was given that the defendants knew anything about this neglect.

It has been argued before us, on behalf of the plaintiffs, that their claim under paragraph 7 in the amended statement of claim is a claim in respect of the violation of a statutory obligation imposed by the 458th section of the Merchant Shipping Act of 1894, and it is alleged in the said paragraph that the defendants did not use all reasonable means at the time the voyage commenced to insure the seaworthiness of the said steamship, and to keep her in a seaworthy condition during the voyage. I can find no reasonable evidence given by the plaintiff that at the commencement of the voyage all reasonable means were not used to insure her seaworthiness when the voyage commenced, and to keep her in a seaworthy condition during the voyage, within the meaning of the said section. The case of *Hedley* v. *Pinkney & Sons*

Steamship Company (1), and other cases to which I shall hereafter refer, decide that the section imposes upon owners of vessels duties which must be performed by them before the voyage commences, and does not impose on them any further liability in respect of matters which may arise during the progress of the voyage. I shall have occasion to refer more in detail to this case, and others, in a subsequent portion of my judgment. If I am right in this construction of the section, any claim founded on the omission of the captain to correct the list which the vessel had before she resumed her voyage from Rathmullen cannot be considered on the question whether the requisition of the defendants for a direction at the close of the plaintiffs' case should have been complied with.

I am of opinion the learned Judge was wrong in not acceding to the request of the defendants.

It having been decided that the case should go to the jury, the defendants produced several witnesses.

Captain M'Clenaghan, the captain of the "Cloughmore," proved that it was the mate's duty to instruct the stevedore as to the loading, and that he was to be satisfied with the stowage that the vessel was seaworthy when she left Liverpool. Just before arriving at Lough Swilly he noticed a slight list to port, which was nothing unusual, and he thought it was caused by the coal being used from the starboard side of the bunker. He put into Lough Swilly in consequence of the condensing-tube leaking, and he went in to get it repaired, and had same done; it took about twelve hours to repair—the list was very slight, about 4 inches. It was caused by using more coal from starboard than port side; and when leaving Lough Swilly, there was no danger from the list, and up to 12 o'clock on the night he left, the list had not increased. After he left it came on to blow very hard from about north-west, with a heavy sea. The sea and wind was on the starboard side, and at about 12 o'clock at midnight the list increased. She shipped a very heavy sea, which burst the port-door of the engine-room hatch, and flooded the engine-room, and caused her to founder; 111 sacks of grain were put into fore-hatch to trim the vessel; she listed the same as any other vessel.

(1) [1892] 1 Q. B. 58; [1894] A. C. 222.

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Murphy, the second mate, stated that a couple of hours before going into Lough Swilly he first noticed a slight list, about 5 degrees of list; the coal was the cause; there was nothing to prevent the bunker-coal from listing. Mr. M'Ilwaine, who acts as an assessor in the Admiralty Court, stated that he had large experience of vessels, and never knew of shifting-boards in coasters; that bags are sometimes used for trimming, and the grain in the coamings acts as feeder for the hold; the water would be on the deck if the vessel had the list Quirk mentioned. He further stated that no precaution as to stowage would be practicable beyond what had been described, and that in this class of vessel a grain cargo is not dangerous.

Maguire, the engine-man, proved that the coal-bunker was about half full, and that he helped to take off the condenser-door in Lough Swilly for the purpose of the repairs.

Mr. Fullerton, the shipbuilder at Paisley who built the "Cloughmore," proved that he had twenty-nine years' experience of building such vessels, and had built 170 of them, and never fitted shifting-boards in any of them, and never saw them in any but foreign-going ships. The fore-hatch of the "Cloughmore" was 28 feet by 14 feet, divided into three sections by transverse steel beams from top of coamings to deck. The after-hatch was 26 feet 3 inches by 14 feet, similarly divided, and the beam of the vessel was 26 feet 6 inches, and the depth of hold 10 feet. The coamings of the fore-hatch were 4 feet high from the deck; and those of the main-hatch, 3 feet 6 inches. Davis stated in evidence that he only knew one vessel with higher coamings than the "Cloughmore," but he knew many that have the same height.

Meaher, who acted as foreman stevedore on the first day and second foreman on the second day, proved the death of Goddard, the chief foreman. He proved that this vessel was loaded the same as any other boat. The hold was quite full, the after-hatch was full up and squeezed down, and there was not room for half a sack in it, and it could not be filled better. About two loads of sack, 65 or 55 in each load, were put into the coamings of the fore-hatch, and when that was done, we had a well-stowed ship—the bags were put into the fore-hatch to fill it, and to trim the vessel. The mate was walking up and down the quay watching th

draught; he watched the stowage, and was in the hold two or three times during the day. Mr. Turpin, Lloyd's senior surveyor at Liverpool, proved that he never saw or heard of shifting-boards in coasters.

At the close of the evidence defendants' counsel asked for a direction on the ground that there was no evidence to support any of the causes of action set out in the pleadings, and contended that there was no evidence at all to support question 1, and as to question 2, that it was not relevant, and that there was no evidence that the vessel was unseaworthy within the meaning of section 458 of the Act of 1894, or at all. They also contended that there was no evidence of unseaworthiness when the voyage commenced, and contended that if the vessel was then seaworthy, defendants could not be liable, having regard to the decision in *Hedley* v. *Pinkney & Sons Steamship Co.* (1).

The learned Judge refused to direct as asked, and left several questions to the jury. He intimates in his report that, in his opinion, the question as to whether the vessel was unseaworthy (within section 458) by reason of the list in Lough Swilly remaining uncorrected was not free from difficulty, and that the main question appeared to him to turn on section 452, and that neither the mate nor the crew were, upon the evidence, as a matter of law, precluded from complaining. By their defences the defendants not only traversed the negligence and breaches of duty complained of, but also pleaded that the deaths complained of were due to the negligence and breach of duty of a fellow-servant, or fellow-servants, of the deceased engaged in a common employment.

It is to be observed that in the several paragraphs of the statement of claim, as originally served, it is alleged that the losses and damages complained of were caused and occasioned by acts of negligence on the part of the defendants, and that it was by their negligence the vessel was in an unsafe and unseaworthy condition and unfit for the voyage, as the defendants well knew, or ought to have known, but of which the deceased men were ignorant. In the amendment to the state-

(1) [1894] A. C. 222.

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ment of claim, numbered paragraph 7*a*, the plaintiffs rely upon the provisions of sect. 458 of the Merchant Shipping Act, 1894.

I have gone carefully through the evidence, and am, I confess, unable to find any specific act of negligence, or breach of duty, proved against the defendants in any respect. Various suggestions have been made in the questions put to the witnesses on cross-examination as to what might or might not have been done, and hypothetical questions asked as to whether if such and such things had been done it would not have made the stowage of the cargo better; but no evidence was given by any independent and expert witness whether it would be right or proper to adopt such measures, and it was not proved by anyone such measures were ever adopted. I have already referred to the cases bearing on this question. Negligence has been defined to be the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or the doing something which a prudent and reasonable man would not do. Where is the evidence in this case of any such omission or commission? There are very many men who devote their lives to the stowage of cargoes, including grain cargoes, who could have been produced as witnesses, and have not, for, I presume, the reason that they could not prove that Davis had omitted to do anything which ought to have been done, or had done anything wrong or unusual in the present case. Davis appears to be a man of vast experience in the stowage of cargoes, and had previously on many occasions stowed similar cargoes on board the "Cloughmore"; and he and the other witnesses state distinctly that this cargo was properly stowed. Only two suggestions of default have been made—(1) the absence of shifting-boards, and (2) that more sacks were not used. Judging from the numerous questions on the subject, I would infer that the former of these was that on which most reliance was placed. Every witness has stated that in coasting-vessels shifting-boards are never used; and Mr. Fullerton states that though he has built 170 of such steamers, he never fitted any with shifting-boards, and never saw any vessels so fitted except foreign-going vessels. The object and use of the very high coamings to the hatches of this vessel, holding about one-tenth of the entire cargo, was that they should act as feeders to the cargo

in the hold of the vessel, in case it should, as usual, somewhat settle down; and, so far as appears, they had theretofore proved satisfactory. In the 18th schedule to the Merchant Shipping Act of 1894, which applies to vessels trading in the most dangerous localities, special provisions are made for feeders for the cargo; and in the absence of such feeders for cargoes in bulk requires a specified proportion of the cargo shall be carried in bags, thereby showing that bags are only required in the absence of feeders. In most ordinary vessels the coamings are not anything like so high, nor the hatches so large, as they were in the "Cloughmore." The entire width of the vessel was 26 feet 6 inches, and the cubic capacity of the hold was 25,512 feet. The coamings of the fore-hatch were 4 feet high above the deck. The fore-hatch was 28 feet long by 14 feet wide, and the main-hatch was 26 feet long and 14 feet wide, and its coamings were 3 feet 6 inches high. Each coaming was divided into three compartments by means of steel beams or partitions, which extended from the top of the coamings down to the deck. These beams divided each hatch into three equal compartments. The cubic capacity of the two hatches was 2548 feet, or about one-tenth of the capacity of the hold. The hold was only 10 feet deep to the ceilings or floor of the hold. The entire cargo of the vessel was 632 tons, and of this there was 60 tons stowed in the hatches, or about one-tenth of the entire cargo; and, owing to the construction of the hatches, they acted as feeders for any subsidence in the cargo. As I have stated, the width of the vessel was 26 feet 6 inches, and the hatches were 14 feet wide, so that on either side of each hatch there was only a space of 6 feet 3 inches to each side of the vessel. If any sinking or subsidence of the cargo took place, it naturally would occur mostly in the centre of the heap or under the hatches, and these, being filled with grain, would fill up such sinking, and the sides of the coamings would necessarily act in the same manner as if there were shifting-boards, and prevent the cargo from shifting. From the construction of the vessel, as above described, I cannot see how the cargo could have shifted, and in my opinion it did not. There is no evidence that it in fact did shift, and there is only the belief or opinion that it did shift expressed by some of the witnesses when asked to account for

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the list. As to the amount of list described by Neill, the coastguard, that it was 18 to 22 degrees, it, to my mind, is perfectly absurd. The vessel had only one foot freeboard; and if any such list existed, a large portion of her deck would have been under water. This same man says that with such a list he would consider it very dangerous with a cargo of corn, but not with a cargo of coal. Fowler, the other coastguard, describes the list as making the vessel awkward to walk on her deck, and that it was more than usual with this class of steamer; but he could not say it was dangerous, and he did not report it to his officer, and if it was dangerous he would have reported it. These men are more accustomed to be on board of men-of-war, where they are not accustomed to any list, and they have no experience in coasting-steamers.

In my opinion the list was not caused by any shifting of the cargo; but was caused in its early stages by the using of the coal from the starboard bunker, and was afterwards increased during the gale by the shifting of the coal in the coal-bunker. I will state the grounds on which I have arrived at this conclusion.

The coal-bunker extended across the entire width of the vessel, and was the entire depth of the hold. It was 5 feet 3 inches long, and necessarily was not divided by any partition, as if it had been the coal could not flow as used to the doors in the stokehold. There was one door on the starboard side, and one on the port, and either door could be used as circumstances might require. The bunkers had a capacity for 59 tons; and when leaving Liverpool she had, at the most, 50 tons—one witness says only 20 tons—on board. From 8 to 10 tons were used from Liverpool to Lough Swilly. The "Cloughmore" was very flat in the bottom and shallow, and from these causes would be more liable to list than a deeper and sharper vessel. The Captain believed that the list was caused by the coal having been taken from the starboard side, and gave directions to take more from the port. He further stated that he had often before seen the vessel with a list from more coal being used off one side than the other, and that if 5 or 6 tons were taken from the starboard locker, it would give the list he noticed. It is manifest no one on board thought anything of the list, as the vessel often listed as much before, and no harm resulted from it.

It was very calm weather from Liverpool to Lough Swilly, and, as the captain stated, there was no weather to shift the cargo, and that with a list of 8 degrees she would be dangerous, and with such a list he would not have gone to sea; and that it was only a matter of speculation that the cargo shifted. Murphy, the second mate, who was twenty-two years at sea, corroborates the master as to the list being only slight, and that he noticed it first about two hours before going into Lough Swilly; and that there was no rough weather up to that; and that the cause of the list was the using of the coal, and there was nothing to prevent the coal in the bunker rolling from side to side. It is absurd to suppose that the captain or any of the crew would have put to sea from Rathmullen if the list had been such as described by the coastguards, and there was no weather to cause any such list, or to shake or shift the cargo. I think it is material to consider the quarter from which the wind was blowing, and the sea was coming, after the vessel left Rathmullen, and what was the course the vessel steered, and what was the condition of the vessel. The wind was blowing strong from N.N.W., and gradually increased. The course steered was W. by N., and accordingly the force of the wind was on the starboard side. The coal-bunker was then only about two-thirds full, so there was a considerable space empty. The vessel had a list to port, and the wind and sea being on the starboard side increased this list. Naturally the stokers in the hold would take the coal from the higher side, as it would be easier for them to work, and this, coupled with the wind and sea, would, as stated in the evidence, gradually increase the list, and when she was struck by a heavy sea, as stated in the evidence, on the starboard side, the coal in the bunker would be thrown over to port side and give her a heavy list, as described, and before she could right herself another heavy sea struck her, and about 100 tons of water came on board and burst in the engine-room and stokehold doors, and filled her, and in consequence she foundered. I am satisfied from the evidence, and the description of the casualty, that the heavy list she took was caused by the shifting of the coal in the bunker when the heavy seas struck her. The cargo was full up in the vessel, but the coal had plenty of room to shift. By the 9th defence the defendants deny that it was by

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reason of any of the matters alleged in paragraph 7 of the statement of claim that the said vessel foundered; and the 10th denies that the deaths were caused by the alleged default of the defendants. If I am right as to the shifting of the coal having produced the calamity, these defences have been substantiated.

The allegation in the 5th, 6th, and 7th paragraphs of the statement of claim is, that, by the negligence of the defendants, necessary and reasonable precautions were not taken by them to secure the grain cargo from shifting, or for the proper stowage and security of the said cargo, and that, by the negligence and default of defendants, the said vessel was in an unsafe and unseaworthy condition, and unfit for the purpose of the said voyage, as defendants well knew, or ought to have known, but of which the deceased were ignorant. Besides the absence of shifting-boards, to which I have referred, the only other default on the part of the defendants is some vague suggestions as to the defect in the stowage of the cargo by reason of non-introduction of a proper proportion of bags properly stowed under deck. The only witness who at all referred to the use of bags, as suggested, was Mr. M'Ilwaine; but when fairly considered as a whole, I do not think his evidence at all supports this contention, and I transcribe a few lines of his evidence to show this. After referring to the use of shifting-boards, he proceeds:—"Loaded in bulk, a vessel holds more grain. Bags sometimes used for convenience of trimming ship. . . . Grain in coaming acts as feeder if there is a subsidence. When hold is quite full, there can be no shifting. The bags should be put into empty spaces near the hatches." [The Judge in his report states that the witness explains that when corn is emptied down hatch, the spaces under deck at side of hatch would be empty.] Further down in his evidence he states:—"No precaution as to stowage would be practicable beyond what has been described." If he meant to convey by the words, "The bags should be put into empty spaces near the hatches," what bags does he refer to? his only previous reference to bags is that they are sometimes used for convenience of trimming ships. Does he mean to convey that the bags should be put into the empty spaces for trimming purposes? He cannot have meant that, as it would

be absurd nonsense. The only use of bags for trimming would be for trimming fore and aft to bring her to her proper depth, as described by other witnesses, and for which purpose they were used on the "Cloughmore" in the fore part of the fore-hatch. Had grain been put in all in bulk in the fore-hatch, she would have been too much down by the bow, and her stern would have been too high. In the words of one of the witnesses, the bags were put in for the purpose of keeping her down by the stern. If M'Ilwaine means that when the grain is emptied down the hatch, the spaces under deck at side of the hatches would be empty, as stated by the learned Judge, it is equally absurd, for why would there be empty spaces any more at the sides of the hatches than at the sides of the vessel elsewhere than at the hatches? There is no evidence that the grain on the "Cloughmore" was emptied down the hatches. However it was put on board, the men below in the hold had to shovel it up to the sides, and it would be far easier to do so at the hatches than in any other portion of the hold. From the sides of the hatches to the sides of the hold was only 6 feet 3 inches. Elsewhere in the hold the distance from the centre to the side would be 13 feet 3 inches, and far more difficult to fill in. I do not know what the form of the question was to which the answer was given; but he cannot have meant to convey that the spaces at the sides of the hatches could not have been filled in in bulk, as that would be absurd. Besides, as I have stated, in a subsequent portion of his evidence he has stated that no other stowage was practicable except what has been described, not by him, but by the other witnesses.

This one statement has been seized on by the jury to base their answer to question 1*c*—"The stowage was improper by reason of want of proper bagging." I think this finding, besides being against the weight of evidence, is uncertain and vague. What is the meaning of proper bagging?

As to the negligence alleged in the 7th paragraph, that the vessel was unseaworthy to the knowledge of the defendants, and of which the deceased were ignorant: The first statute that made any provision as to the shipping of grain cargoes or their stowage was the Merchant Shipping Act of 1876 (39 & 40 Vict. c. 80), and that statute, by section 22, provides that no cargo of

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which more than one-third consists of any kind of grain shall be carried on board any British ship unless such grain cargo be contained in bags, sacks, or barrels, or secured from shifting by boards, bulkheads, or otherwise.

After four years' experience, this section of the Act of 1876 was expressly repealed by the Grain Cargoes Act of 1880 (42 & 43 Vict. c. 43), section 11, and by section 2 it was provided that all necessary and reasonable precautions shall be taken in order to prevent the grain cargo from shifting. Section 452 of the Act of 1894 (57 & 58 Vict. c. 60) is copied precisely from section 11 of the Grain Cargoes Act.

I presume it was found that the provisions for the carriage of grain in bulk, imposed by the Act of 1876, were unnecessarily restrictive, and it was deemed right only to make the provision which now exists, which merely provides that all necessary and reasonable precautions shall be adopted.

How is it to be ascertained what precautions are necessary and reasonable? Surely the only way this can be discovered is by seeing what precautions have been found from long experience and practice to be effective. A ship is divided into sixty-four shares, and there may thus be sixty-four owners of a ship. All of them may be liable to the fine imposed by section 452, and otherwise; but it is manifest that all cannot interfere in the loading or management of the ship, and it is, therefore, manifest that these duties must necessarily be delegated to some experienced and qualified person or persons. As to the stowage of cargoes, it is the usual and proper course to employ persons who are conversant with such matters, and who are called stevedores. In the present case Davis was so employed, and it cannot be imputed to the owners that in selecting a man of such vast experience they were guilty of negligence. Then the question arises, Was he negligent in the mode in which he discharged his duties? Of this I see no evidence. Paragraph 7 of the statement of claim alleges that the defendants well knew, or ought to have known, the unsafe condition of the ship. There is no evidence they knew anything about it, and I fail to see how they should have known it. Davis worked at the stowage, but the ship was represented on the occasion by the mate, whose duty it was to superintend Davis, and see that

everything was done to his satisfaction. Both Davis and the mate were fellow-servants of the crew; and if anything was wrong with the stowage, Davis and the mate were the parties responsible and guilty of the default, if there was any, and if so, I think the defendants are not liable. It has been contended on the part of the plaintiffs that in this case there was a statutory duty imposed upon the defendants, and that, therefore, the doctrine of fellow-servants engaged in a common employment does not apply, and the case of *Groves* v. *Lord Wimborne* (1) was referred to in support of this contention. In that case the statute which was relied on by which the duty was imposed was the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), section 5, which provides absolutely that certain machinery shall be fenced, and that all fencing shall be constantly maintained in an efficient state. It was proved that a certain cog-wheel, connected with a winch, had been fenced, but the fencing had been removed and had not been replaced during a period of six months while the plaintiff was employed at the winch. The action was brought for the violation of the duty imposed by the statute, and it was held that as under the statute the duty was absolute to fence and maintain fenced, the defence of common employment was not applicable. Lord Justice A. L. Smith (p. 410) states:—"But in my judgment the defence of common employment only applies where the action is by a servant against the master, and is founded upon the negligence or misconduct of his fellow-servant. In such a case the doctrine of common employment attaches. In the present case, which is an action founded upon the statute, there is no resort to negligence on the part of a fellow-servant or of anyone else. There being an unqualified statutory obligation imposed upon the defendant, what answer can it be to an action for a breach of that duty to say that his servant was guilty of negligence, and, therefore, he was not liable?" And Rigby, L.J. (p. 412), states:—"Where an absolute duty is imposed upon a person by statute, it is not necessary, in order to make him liable for breach of that duty, to show negligence. Whether there be negligence or not, he is responsible, *quâcunque*

(1) [1898] 2 Q. B. 402.

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viâ, for non-performance of the duty"; and again (p. 413): "If it is incumbent on the plaintiff to prove negligence on the master's part, that doctrine may apply." In the present case, not only are the causes of action in the 4th and 7th paragraphs of the statement of claim founded on negligence, but the provisions of section 452 do not impose any absolute duty to do anything except to take all necessary and reasonable precautions.

The cause of action set out in paragraph 7 *a* is grounded on the 458th section for not taking reasonable means to insure the seaworthiness of the "Cloughmore" at the time the voyage commenced, and to keep her in a seaworthy condition during the voyage.

Section 458 of the Merchant Shipping Act of 1894 is exactly the same as sect. 5 of the Merchant Shipping Act of 1876 (39 & 40 Vict. c. 80).

In the case of *Hedley* v. *Pinkney & Sons Steamship Company, Limited* (1) the action was brought by the representative of a seaman on board a steamship belonging to the defendants. The action was for alleged violation by the defendants of the duties imposed on them by sect. 4 and sect. 5 of the Merchant Shipping Act, 1876, and the questions argued were as to the meaning of "seaworthiness" in those sections, and also as to whether the defence of fellow-servant applied to the breaches of the duties imposed by those sections.

Lord Esher, M.R., in his judgment, adopts the definition of the word "seaworthy" given by Parke, B., in *Dixon* v. *Sadler* (2), viz.: "That she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage, insured at the time of sailing upon it"; and he held on the facts in that case that the negligence proved was the negligence of the captain, for which the owners were not responsible. Lopes, L.J., in his judgment (p. 66) says:—"I am of opinion the action cannot be maintained. The action is put in the first place as an action for negligence of a servant of the owners, for which they are responsible. There is no doubt that the accident was occasioned by the negligence of the defendants'

(1) [1892] 1 Q. B. 58; [1894] A. C. 222. (2) 5 M. & W. 405.

servant, the captain; but the question is whether the owners are responsible for his negligence. It seems to me clear that they are not, upon the principle of law which has been well known since the decision in *Priestley* v. *Fowler* (1), and was acted on in *Wilson* v. *Merry* (2), viz., that the master is not liable for injuries occasioned to a servant by the negligence of his fellow-servant, principally because such negligence is one of the risks which the servant must be taken to have contemplated and undertaken when he entered into the employment."

The decision in this case was affirmed in the House of Lords.

It is to be observed that the obligations imposed by sections 4 and 5 of the Act are equally statutory obligations, and I think the obligation imposed by sect. 4 is, if anything, stronger, as it makes it a misdemeanour to send an unseaworthy vessel to sea, whereas sect. 5 merely provides that it shall be an implied term of the contract of service. If the doctrine of common employment applies to the former, it appears to me, *a fortiori*, to apply to the latter. Negligence has been, and could only be, alleged on the part of the stevedore in the loading of the vessel, or on the part of the captain in not correctiug the list when at Rathmullen. In either case the negligence was by a fellow-servant engaged in a common employment; and I am of opinion that this affords a defence to the action.

The case of *Kopitoff* v. *Wilson* (3) has been referred to on behalf of the plaintiffs; but, in my opinion, the duty imposed upon owners of vessels in respect of the goods on board is quite different from those imposed by the sections of the Merchant Shipping Act, 1894, relied on in the present case. In cases in respect of the carriage of goods upon vessels there is an absolute warranty of the seaworthiness of the vessel, and her fitness to carry same safely and securely. The same principle applies to cases of insurances on the vessel. There is no such warranty in the present case, and, therefore, the cases applicable to the carriage of goods and to insurances have no application.

As to the measure of the owners' obligation under sect. 452, which is merely to use all reasonable means to enforce observance

(1) 3 M. & W. 1. (2) L. R. 1 H. L. Sc. 326. (3) 1 Q. B. D. 377.

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of the section, and as to seaworthiness to use all reasonable means to insure the seaworthiness of the ship for the voyage, I omitted previously to refer to one observation that has been made in the argument on behalf of the plaintiffs, viz., that the voyage to Galway is what one of the witnesses termed "a foul voyage," otherwise a dangerous one. This, of course, must be taken to be that it may be so owing to the heavy seas on the west coast of Ireland. It must, however, be remembered that this voyage was to be performed in the middle of the summer, in the month of June, when bad weather is not usually expected, and when very small vessels frequently sail and steam round the coast in perfect safety. However that may be, Davis, the stevedore, knew where she was going, and had loaded her before for the same voyage with a similar cargo.

There is only one further observation I desire to make with reference to the conduct of the case before the Board of Trade inquiry, and also during the trial of the action, which, I think, throws a strong light on the nature of the complaint originally made on behalf of the plaintiffs as to the cause of the fatality. By far the greater portion of the cross-examination of the captain was directed to prove that he designedly caused the catastrophe, either for the purpose of obtaining the insurance upon the loss of the vessel, or in consequence of his gross and inhuman misconduct. With what object was he questioned as to the absence of row-locks in the boat in which the mate was, or how the mate received the wound on the head, or how it came about that he, the captain, was wearing the mate's watch-chain, and numerous other insinuations of heartless or wilful misconduct? These suggestions and insinuations would naturally prejudice the tribunals before whom the case came, and, in my opinion, should not have been made, as there was not a shred of evidence to support them.

On a careful review of the whole of the facts, and the law applicable thereto, I am of opinion the verdict should be entered for the defendants.

KENNY, J. :—

I had the advantage of reading Mr. Justice Andrews' judgment before its delivery, and I concur, not only in the result at which he has arrived, but in the reasons he has given for his conclusions. The case is one of considerable importance from a public aspect in this—that we have heard arguments addressed to us which go the length of justifying, on the ground that it is customary, a condition of things in the case of grain cargoes in bulk, which involves the dispensing with well-known and, what I cannot but regard as, necessary and reasonable precautions in the interest of human life. It seems to me, not only on the evidence given in this case, but on the sections of the Merchant Shipping Act of 1894, that there are well-known and recognized methods of stowing grain in bulk, adopted with a view to prevent the shifting of the cargo and to thereby minimise the danger to which vessels engaged in the grain-carrying trade may be subject. The Act provides for these expedients being used in the case of vessels trading from the Mediterranean and Black Sea and coast of North America, and it is suggested that because these safeguards are specifically made compulsory only in the last-mentioned cases, and because there does not appear to be any rule or order of the Board of Trade extending the obligation to coasting-vessels in the United Kingdom, the owners of such vessels are exempted from liability for not adopting them. The implication from such an argument must be either that there are no risks attendant on the home trade, or that human safety and human life—when in competition with the desire to carry the largest possible cargo—are of secondary importance in these coasting-vessels. I cannot think that the Legislature ever contemplated that such inferences could be drawn from its action. Around our coasts, at various seasons of the year, tempestuous weather of almost as dangerous a character to shipping as any that occurs in the Atlantic Ocean is experienced; and it would be an unfortunate conclusion to arrive at that less care was to be bestowed in providing for the safety of seamen employed in this perilous calling simply because their vessel was not engaged in an ocean voyage. In my opinion, notwithstanding the special section of the Act dealing with these ocean-going vessels and providing for extraordinary safeguards

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in the case of grain cargoes, it would be a most erroneous construction to place on the other sections, that they exempted the parties from adopting any of those special precautions in the case of other ships. It is no answer to the alleged breach of duty to assert that the particular mode of stowage of the grain cargo in question has hitherto been customary. If a mode of stowage has been adopted which, having regard to other well-known expedients, is, in the interest of human life, less safe, and less calculated to prevent a dangerous shifting of the grain, then the party on whom the obligation is cast of using all necessary and reasonable precautions for the purpose of insuring the seaworthiness of the ship for and during the voyage must be prepared to justify his action. The occupation in which seamen are engaged is one highly fraught with danger, and, in the case of grain-laden vessels, much more so on account of the tendency of the cargo to shift without recovery, and to thereby create a list; and if the person responsible for the stowing of the cargo has it in his power to largely avert the consequences of that danger by the use of reasonable precautions, he is bound to adopt these precautions, and if he does not do so, he is, in my opinion, guilty of a breach of duty. In this Court, in the case of *Burrell* v. *Tuohy* (1), concurring with the opinion of the present Lord Justice Holmes, who tried the action, we were unanimously of opinion that the Board of Works, who were responsible for the moorings in Kingstown harbour, were liable for damages caused by the breaking of a ring in a buoy to which a vessel was moored. The ground of our decision was that, though the ring had gone through certain testing processes, yet there was another well-known test which, if it had been applied, might have disclosed the admitted flaw, and that there was negligence on the part of the defendants in attaching a ring not so tested. The duty on a party under such circumstances is to exercise due and reasonable care and foresight, having regard to the exigencies of the case; and where the employment is one, like that in the present case, involving peril to life, I am of opinion that the highest care and the best precautions in known practical use for securing the safety of those grain cargo vessels and their crews

(1) [1898] 2 I. R. 271.

should be used. The owners or charterers are not insurers, but they must make due provision so far as human care and foresight can go for the safety of those who engage in this hazardous calling. The questions in the case, therefore, resolve themselves into these—(1) Was there sufficient evidence to satisfy the jury in their finding that reasonable and necessary precautions were not taken? and (2) whether, if the evidence was sufficient, the owners of the vessel are responsible? The consideration of this latter question involves the application of the doctrine of common employment.

My brother Andrews has referred to the 458th section of the Merchant Shipping Act of 1894 as creating an obligation on the owner of the vessel that not alone himself but the master and every agent charged with the loading of the ship or preparing her for sea shall use all reasonable means to insure seaworthiness at the commencement and throughout the voyage. This duty of the owner, according to the section, is to be implied in the contract of service with the crew—thereby becoming an additional term of the contract. The seaman cannot contract himself out of it, for the section provides that it is to have effect notwithstanding any agreement to the contrary. It, therefore, derives its essence and force from the Act of Parliament, and, in my opinion, though in form an implied term of a contract, creates an absolute and unqualified statutory duty. I see no difference in statutory character between the obligation thus imposed, and that arising in respect to the fencing of machinery under the Factory and Workshop Acts of 1878 and 1891. Under these Acts an absolute duty has been held to be imposed by the statutes (*Groves* v. *Wimborne* (1)), for the breach of which a civil action will lie. But if there was a doubt as to the creation of an absolute statutory duty by *this* section, it seems to me that none is presented on the 452nd. Nothing can be wider than the language here:—"All necessary and reasonable precautions, whether mentioned in this part of this Act or not, shall be taken in order to prevent the grain cargo from shifting." I cannot imagine a provision more absolute and mandatory. It does not exclude the special precautions essential for an ocean-going ship pursuant to the 453rd section. It stands by

(1) [1898] 2 Q. B. 402.

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itself, independently of the next sub-section, which deals with the enforcement of the duty by fine; but, in my opinion, this provision for a fine in no way derogates from or weakens the general application of the duty created by the 1st sub-section. But the latter differs in one essential respect from the 458th section in this, that it makes no specific mention of the person or persons on whom the obligation is cast to take the precautions, or what these precautions are to be. Consequently, it may well be argued that the obligation created by this sub-section does not exceed in force and effect the liability which would be imposed by the Common Law, and that the obligation on the part of an owner would be fulfilled—or, perhaps, would not arise—once he had appointed a competent person, whether he be captain, mate, or stevedore, to see to the proper stowage of the cargo. Furthermore, in a case like the present, the principle of non-liability, based on common employment, might be said to apply. I offer no opinion on these questions, having come to a like conclusion to that arrived at by my brother Andrews that we can determine the case on the construction and effect of the 458th section, where the owner is *eo nomine* fixed with a liability. But the 452nd section has still a considerable bearing on the 458th, for if the necessary and reasonable precaution to prevent shifting contemplated by the former be not taken; in other words, if the mode of stowing the cargo were such that shifting, and a consequent list, would be more likely to occur than if other safer methods were used, it could scarcely be said that a vessel so loaded could be regarded as seaworthy in the sense in which that word is used in the judgment of Parke, B., in *Dixon* v. *Sadler* (1). Thus, the same circumstances that constituted a breach of the duty imposed by section 452 might—and in the present case, in my opinion, would—support a finding of unseaworthiness within section 458. The jury here have found that there has been a breach of the duty imposed by the 452nd section by reason of "want of proper bagging" in the stowage of the grain. My brother Andrews has referred at length to the evidence, which he and I consider to have been enough to justify the finding, and I am not going to repeat it. But I may add

(1) 5 M. & W. 405, 414.

this, that if I am right in thinking that the 452nd section is wide enough to include the methods of stowage in ocean-going vessels, one of these methods is the carrying of not less than one-fourth of the grain in bags supported on suitable platforms laid upon the grain. Why were not the angle spaces filled with sacks—why was there not more grain in sacks used to steady the cargo? I answer—for the obvious reason, that with that kind of stowage a much smaller cargo would be carried. I, therefore, think that there was evidence on which the jury were justified in coming to the conclusion that necessary and reasonable precautions were not taken to prevent shifting. That is, in my opinion, in effect, a finding that the vessel was unseaworthy at the commencement of her voyage. They have also found, in express terms, that she was unseaworthy when leaving Lough Swilly, by reason of the list caused by the shifting of the grain. I also think—without repeating the evidence—that the latter was sufficient to justify this finding.

With these questions of fact thus found in favour of the plaintiffs, the only remaining question is whether the defendant company, as owners of the vessel, are liable in this action? As I have already said, the obligation created by the 458th section is, in my judgment, an absolute statutory one. It is imposed on the owner of the ship, and it makes him answerable for the acts of the master and every other agent charged with the loading of the ship. The obligation is to use all reasonable means to insure the seaworthiness of the vessel. The jury, as I hold, have in effect found that reasonable means to insure seaworthiness were omitted to be taken before the vessel started, and when she was in Lough Swilly. It is no answer to this charge to say that competent officials were appointed by the defendants, the owners, and that the negligence, if any, was attributable to these officials, In *Groves* v. *Wimborne* (1) the Judges in the Court of Appeal were unanimous, notwithstanding the dictum of Lord Chelmsford in *Wilson* v. *Merry* (2), that the doctrine of common employment did not apply in the case of an unqualified statutory duty. There is a direct obligation laid on the defendants, and in the words of the

(1) [1898] 2 Q. B. 402. (2) L. R. 1 H. L. Sc. 326.

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late A. L. Smith, L.J., they "cannot shift their responsibility for the performance of the statutory duty on to the shoulders of another person." The case is not like that of *Hedley* v. *Pinkney & Sons Steamship Co., Limited* (1), where the question before the Court was whether there was unseaworthiness at all, or merely negligence on the part of the master in not using the appliances placed at his disposal.

I, therefore, concur in thinking that the defendants, the owners of the vessel, are liable, and that the verdict and judgment for the plaintiffs should not be disturbed.

Motion to set aside the verdict refused, with costs.

R. ST. J. C.

Appeal. June 6–8, 19.

The defendants appealed (2).

Serjeant Dodd, O'Shaughnessy, K.C., M. J. Dunn, and *J. Cusack,* for the appellants:—

The decision of the King's Bench should be reversed on two grounds—(1) the findings of the jury do not entitle the plaintiffs to a verdict against the company; and (2) there was no evidence to sustain the verdict on the first finding. By the Merchant Shipping Act of 1876 (39 & 40 Vict. c. 80), sect. 22, it was enacted that a cargo of which more than one-third is grain shall not be carried in a British ship unless it is in bags, sacks, or barrels, or be secured from shifting by boards, bulkheads, or otherwise. This was repealed by the Merchant Shipping Act of 1894 (57 & 58 Vict. c. 60), and sect. 452 of the latter Act provided that where a grain cargo is laden on board any British ship, all necessary and reasonable precautions shall be taken to prevent the grain cargo from shifting. It is perfectly lawful to carry a cargo of grain in bulk; and if the vessel is loaded carefully, there is no reason why such a cargo should be dangerous. The best way to load such a

(1) [1894] A. C. 222.

(2) In the Court of Appeal, before PALLES, C.B., and FITZGIBBON, WALKER, and HOLMES, L.JJ.

cargo is to fill the vessel choke-full, and to keep it so. That was done.

In order to establish liability on the part of the defendants, it is necessary to prove that the ship was unseaworthy at the commencement of the voyage. The *onus* is on the plaintiffs to show that the shipowner did not use proper precautions. The vessel was loaded under the direction of an experienced stevedore, and she was seaworthy when she left Liverpool. The neglect of the master, if it existed, did not render the ship unseaworthy, or the shipowners liable: *Hedley* v. *Pinkney & Sons* (1). There was not sufficient evidence to prove that the vessel was unseaworthy when she left Lough Swilly; and the finding that the master was in default is against the weight of evidence.

The verdict in favour of the widow of the mate cannot stand, because the mate was answerable for the loading of the vessel; if there was negligence in that, he was guilty of contributory negligence.

Henry, K.C., *Healy, K.C.*, and *Donaldson*, for the respondents:—

There was evidence to support the verdict of the jury that there was negligence in the stowage of the cargo, and that the ship was not seaworthy at two periods of time—(1) when she left Liverpool, and (2) when she left Lough Swilly. The evidence shows that the weather was calm, and the sea smooth, on the passage from Liverpool to Lough Swilly, and yet, on the ship's arrival at Lough Swilly, there was a list to port, which was dangerous. A list of 10 degrees would be dangerous. Moreover, it was contemplated by the charter-party that bags might be used in stowing the cargo, and only 111 bags were used, and they were placed in the coaming of the forward-hatch. Section 452 says that "all necessary and reasonable precautions shall be taken"; but any loading which produces instability in the vessel renders the ship unseaworthy at starting: *The City of Lincoln* (2). The defence of common employment is not applicable in a case where the injury has been caused to a servant by the breach of an absolute duty imposed by statute upon the master: *Groves* v. *Wimborne* (3). The

(1) [1894] A. C. 222. (2) [1904] A. C. 250. (3) [1898] 2 Q. B. 402.

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maxim, *Volenti non fit injuria*, does not apply in cases where the injury arose from the breach of a statutory duty on the part of the employer: *Baddeley* v. *Granville* (1).

The seaworthiness of the ship must continue all through the voyage: *Hedley* v. *Pinkney & Sons* (2). The ship was not seaworthy when she left Lough Swilly, according to the definition of "seaworthy" given by Parke, B., in *Dixon* v. *Sadler* (3); and the master did nothing to ascertain the cause of the list.

June 19.

PALLES, C.B.:—

This is an appeal from an order of the King's Bench Division, by which that Court, consisting of Andrews and Kenny, JJ. (*dissentiente* Boyd, J.), refused to enter a verdict for the defendants in these consolidated actions, or to direct a new trial.

The actions, of which there were four, were brought under Lord Campbell's Act (9 & 10 Vict. c. 93) against the defendants, as owners of the steamer "Cloughmore," by persons representing the mate and three other seamen of that ship, who met their deaths by the vessel foundering in the Atlantic fourteen miles west of Tory Island at about 4 a.m. on the 14th June, 1902, being about seven hours after she left Lough Swilly on a voyage from Liverpool to Galway.

The plaintiffs' claims were founded upon section 458 of the Merchant Shipping Act, 1894, which enacts, *inter alia*, that—

> "In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, . . . there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship that the owner of the ship, *and* the master, *and* every agent charged with the loading of the ship or the preparing of the ship for sea, or the sending of the ship to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to *keep* her in a seaworthy condition for the voyage *during the voyage*."

The plaintiffs' case was that the ship was lost by reason of two separate breaches of the obligation thus imposed upon the owner. They alleged—(1) that the stevedore, who was charged by the

(1) 19 Q. B. D. 423. (2) [1894] A. C. 222. (3) 5 M. & W. 415.

owners with the loading of the ship at Liverpool, was negligent in the stowage of the cargo, which was maize in bulk, in consequence of which it shifted, causing a list of the ship to port, which rendered the ship unseaworthy for the voyage, whereby she foundered; (2) that when the ship was brought into Lough Swilly, she had a dangerous list to port, by reason whereof she was not then seaworthy for the voyage, and that the master brought her out of the Lough and proceeded upon the voyage without having taken any steps to correct the list.

At the trial the plaintiffs gave evidence in respect of each of these alleged breaches; and the learned Judge necessarily submitted questions to the jury in reference to each, as in the event of the jury negativing default of the master in Lough Swilly, the plaintiffs' case would have rested upon negligence in the stowage at Liverpool, causing unseaworthiness. The jury having, however, found default in the master in Lough Swilly, the case now assumes a different aspect, because if this finding stands, this default was the *immediate* or proximate cause of the deaths, and the real cause of action.

For this reason it is convenient, and, as I think, essential to the true determination of the case, to consider, in the first place, the alleged default in Lough Swilly. As to this, the material questions and answers are as follows:—

> "(2) Did the vessel become unseaworthy for the voyage by reason of a list existing when she was in Lough Swilly? *Answer*, Yes.
>
> "(3) If 'Yes,' was such list caused by cargo shifting? *Answer*, Yes.
>
> "(4) Could and ought the master to have corrected the list before resuming the voyage? *Answer*, Yes.
>
> "(5) Was the loss of the vessel caused by default of the master in not correcting the list in Lough Swilly? *Answer*, Yes."

As to this part of the case the defendants' counsel have rightly abandoned any defence grounded upon the master and the crew being in a common employment. Their contentions are four—(1) that it is essential to the liability of the defendants under section 458 of the Act of 1894 that the ship should have been unseaworthy for the voyage at the commencement of the voyage, *i.e.* when she left Liverpool, and that as that fact has not been

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found by the jury, the plaintiffs' case fails; (2) that there is no evidence of the vessel being unseaworthy for the voyage when she left the Lough, or at least no evidence of default in the master in not correcting the list in Lough Swilly, or in proceeding on his voyage although it was not corrected; (3) that, at all events, the finding that he was in default was against the weight of the evidence, and ought to be set aside; (4) that the case was not open on the pleadings, and had not, in fact, been tried.

They also contended that, as to the claim of the family of the mate, there was evidence of contributory negligence on his part at Liverpool, which would disentitle his family from recovering; but I need not say that the cause of action now under my consideration being negligence of the captain, long subsequent to the alleged negligence of the mate, and but for which the consequences of the latter negligence might have been avoided, such negligence of the mate was not, on familiar principles, capable of affording an answer to the action.

The first contention of the defendants, viz. that unseaworthiness at the commencement of the voyage is essential to liability under section 458, derives its importance from its having found acceptance with Mr. Justice Boyd. It is rested solely upon the decision of the House of Lords in *Hedley* v. *Pinkney & Sons Steamship Company* (1). That case was decided upon section 5 of the Merchant Shipping Act, 1876, which is in all respects identical with section 458 of the Act of 1894, upon the construction of which it consequently must be a conclusive authority. In the ship in question there, the bulwarks, which in the other parts of the ship were from 4 feet to 4 feet 6 inches high, were, in the parts abreast the hatch-ways, about 2 feet lower, and removable stanchions and rails were provided which fitted into these parts, and which, when fixed therein, formed part of the bulwarks, which were thus raised to the proper height. If they had been so fixed, the ship would have been seaworthy for the voyage. The stanchions and rails, however, were not fixed *when the vessel left* port, or at all, and there was evidence that it was not safe for the crew that the ship should leave port unless they were fixed. The action was brought to

(1) [1894] A. C. 222.

recover damages for the death of a seaman who, whilst performing his duty during the voyage, was thrown by a heavy lurch of the ship against the bulwarks at one of the places where the stanchions and rails ought to have been fixed, but were not, and was thereby thrown overboard and drowned. The mere statement of these facts shows that the period of time at which the ship ought to be seaworthy, whether it was to be limited to the commencement of the voyage or extended to the entire voyage, could not have been material, because the alleged defect which was said to have rendered the ship unseaworthy existed both at the commencement of the voyage and at the time of the accident which caused the death. It was contended there, both in the Court of Appeal and in the House of Lords, that the expression in the section "seaworthy" meant something different from its well-known meaning in reference to contracts for insurance and carriage of goods—that in the latter cases the ship is regarded in reference to its fitness to carry and deliver goods notwithstanding the perils of the sea; that, on the other hand, the object of the section was to safeguard the lives of the crew, and that "seaworthy" in such a section should mean "fit to carry the crew in safety." The remarks of Lord Herschell, relied on by Serjeant Dodd, were used in reference to this argument. He says:—

> "The case mainly turns in my opinion on the construction to be put upon the words 'seaworthy for the voyage' in the connection in which they are found. The word 'seaworthy' is a well-known term in shipping law, and has a perfectly definite and ascertained meaning. It is used to describe the condition in which a vessel insured under a voyage policy is bound to be *on leaving port* if the contract of insurance is to be effectual against the underwriter.
>
> "Baron Parke, in the case of *Dixon* v. *Sadler* (5 M. & W. 405, 414), defined the seaworthiness of a vessel thus:—'That she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter ordinary perils of the voyage.' Other definitions which have been given do not, I think, substantially differ from this; and I think, when so well-known a word is used in the statute of 1876, it must have its established meaning attached to it."

Having thus ascertained the condition of the ship indicated by the word "seaworthy," he proceeds to apply it to the case then before the House, and accordingly he says:—"The question is,

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then, Was the vessel unseaworthy in this sense *at the time of the accident?*" showing that so far from limiting the time to the commencement of the voyage, he held it to extend to the entire voyage, and thus making the case an authority, not for, but against, the contention of the defendants.

Lord Herschell then proceeds to discuss the question whether the fact that the stanchions and rails were not in their place *per se* rendered the ship unseaworthy, and held, following the opinion of Lord Blackburn in *Steel* v. *State Line Steamship Company* (1), that as this portion of the bulwarks was in a place where it would be, in practice, left open from time to time, but was capable of being speedily shut if occasion required, it could not be said to be unfit to encounter the perils of the voyage; and that if, when bad weather threatened, it was not fixed in its proper place, that would be negligence of the crew, not unseaworthiness of the ship. He then proceeds:—

> "Under circumstances such as these, I do not think it can be said that there has been a failure to keep her in a seaworthy condition for the voyage, within the meaning of the enactment. Following, as it does, the obligation that the owner and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage, I think the words 'to keep her in a seaworthy condition for the voyage during the same' point to an obligation of the same character,"

—that is, to an obligation as to the state of the vessel, its equipment and crew—

> "and not to a neglect properly to use the appliances on board a vessel well equipped and furnished."

Then follows a sentence which further shows that he does not limit the time at which the ship is to be seaworthy to the commencement of the voyage. He says—

> "There is ample scope for the operation of the words in question, even though this construction be put upon the enactment. If any of the necessary appliances were lost or destroyed *in the course of the voyage*, it would, no doubt, be the duty of the master to use all reasonable

(1) 3 App. Cas. 72.

means to supply others in their place, just as it might be his duty *during the voyage* to restore the hull or machinery, if damaged, to a condition suited to the perils to be encountered."

Thus he recognizes a duty under the section for putting in a state of seaworthiness a ship which, although seaworthy at the commencement of the voyage, had ceased to be so during its course. This decision is distinctly in the teeth of the defendants' contention; but even were it inapplicable, and if we had to construe section 458 for ourselves, I could not present to my own mind any form of doubt that its very words demonstrate an obligation to use due care, not only to ensure that the ship shall be seaworthy for the voyage at the commencement of the voyage, but also *to keep* it seaworthy during the voyage, and consequently to reinstate it in a state of seaworthiness if it, within that time, became unseaworthy. No words that I am aware of could impose this obligation more clearly than those used in the section.

This reduces the inquiry here to one of fact, and brings us to Serjeant Dodd's second contention. Was there evidence to sustain the findings? Was there evidence that the vessel had become unseaworthy for the voyage by reason of a list existing when she was in Lough Swilly? The material evidence on this may be stated in a few words.

Mr. Neill, the chief officer of coastguards at Rathmullen, who stated that he had been forty years at sea, observed the ship anchored off Rathmullen on the 13th June, at 8 a.m. "She had a heavy list to port; I would say 18 to 22 degrees. I would consider it very dangerous with a cargo of corn." He ordered Fowler, the chief boatman, to board. "I could see the list with the naked eye quite plain"—and then he adds what I consider very important—"Her masthead plumbed with her port gunwale. That was my reason for estimating number of degrees at 18 or 22." The entry in his boarding-book, tendered in evidence, was objected to by the defendants, and rightly rejected.

Fowler, the chief boatman (who was at sea since 1879), boarded the "Cloughmore." He says, "She had a list to port which made it awkward to walk the deck when I got on board; I cannot say how many degrees. . . . It was more of a list than is usual with this class of steamer." He further stated that he could not say

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whether the list was dangerous. If he thought it was dangerous, he would have reported to his officer.

Captain Quirk, a skilled witness, says, "A list beyond 5 or 7 degrees would be dangerous." The master practically agreed in this. He said, on cross-examination, "Eight degrees of a list would be dangerous. With such a list I would not have gone to sea." He also said that the list before the "Cloughmore" came into Lough Swilly was from 5 to 10 degrees, and that "when leaving Lough Swilly the list was about the same as when she came in."

To this has to be added the not immaterial fact that the vessel was lost within seven or, at most, eight hours after she left Lough Swilly, in weather which, although rough, was not exceptionally severe, and was so lost by reason of the list, which, shortly previously, had, according to the evidence of the master, increased to as much as 45 degrees.

All this is evidence on which the jury might conclude that the list, when the vessel left Lough Swilly, was such as to render the vessel unseaworthy. So much for question 2.

As to question 3, whether the list was caused by the cargo shifting, that is a matter upon which the opinion of expert witnesses is admissible; and the defendants' witnesses, the master and stevedore, swore that, in their opinion, it was so caused. Further, the only alternative cause appearing in the evidence is the alleged shifting of the coal, and the testimony of Maguire negatives that this was the cause.

There remain questions 4 and 5. As it is clear that the foundering was caused by the list not having been corrected in Lough Swilly, and as the jury may have thought that the cargo could have been restowed in the Lough by the use of lighters, if necessary, or that the ship might have been brought to Derry, the only matter involved in these questions is whether there was default in the master in leaving the Lough in the state in which the ship then was. I cannot doubt that there was evidence of this. The danger arose from that which was palpable and open to be seen—the list. The master must have seen such list as the ship actually had; and the question whether he was aware of it is identical with that of its existence. He must have been aware of it; he

did not take even the initial step he was bound to take, viz. search for the cause of it; he did not take off the hatches. If the list were as much as eight degrees—and there is evidence that it was much more—he is condemned out of his own mouth. In my opinion there is evidence that the master, in leaving the Lough, did not act as a reasonably prudent master would have acted in the circumstances in which he was; and this is sufficient to sustain these findings.

The argument for the defendants, on the weight of the evidence, assumed the truthfulness of the master's testimony. But that truthfulness was for the jury. He was a deeply interested witness, and was contradicted by several witnesses—by Neill, Fowler, and Maguire; and, whilst he admitted a list of eight degrees to be a dangerous one, he could not tell whether the list during part of the voyage, between Liverpool and Lough Swilly, was under or over that figure, contenting himself with stating that it was between five and ten degrees. This evidence, as well as several other matters in his testimony, to which I need not particularly advert, presented very serious matter for the consideration of the jury. The fact that he did not seek for the cause of the list whilst in Lough Swilly is also a pregnant circumstance. I see no reason to doubt the honesty of Mr. Neill, and it is impossible to say that the jury might not act upon his evidence as accurate. His evidence and Fowler's (even if largely discounted) are not consistent with the list being less than eight degrees. Besides, the jury may have well held that a list much less than that of the danger-point called for inquiry by the master as to its cause. The learned Judge does not report that he was dissatisfied with the verdict, and it would be contrary to all precedent were we to set it aside as being against the weight of the evidence.

As to the points made on the pleadings, and upon the conduct of the trial, the plaintiffs, by the statement of claim, made the double case of negligence in Liverpool and negligence in Lough Swilly, each of which rendered the ship unseaworthy, and the questions left to the jury show that both of those causes of action were tried.

For these reasons, irrespective of any question of negligence at Liverpool, I am of opinion that the verdict was rightly entered

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for the plaintiffs, and that the order appealed from was right. Holding this opinion, I at one time doubted whether I should express the view I have formed as to whether there was negligence at Liverpool; however, this question was tried, and was made one of the grounds of decision in the Court below, and especially as Serjeant Dodd has pressed for our opinion upon it, I (not without a lingering doubt whether I should do so) proceed to consider it. It will, however, be distinctly understood that I base my judgment upon the captain's conduct at Lough Swilly.

The Act 39 & 40 Vict. c. 80, sect. 22, provided that a cargo, of which more than one-third consists of grain, shall not be carried in a British ship, unless it be contained in bags, sacks, or barrels, or be secured from shifting by boards, bulkheads, or otherwise. This Act is repealed by that of 1894, which, by sect. 452 (1), enacts that when a grain cargo is laden on board a British ship "all necessary and reasonable precautions (whether mentioned in this part of this Act or not) shall be taken in order to prevent the grain-cargo from shifting." Sect. 453 (1) enacts that where a British ship is laden with a grain cargo in bulk, at any one of certain specified ports (which are those from which grain is usually imported into this country, and from which the voyage must be in part by ocean), viz., from a port in the Mediterranean or Black Sea to a port outside the Straits of Gibraltar, or from the coast of North America, some or other of certain precautions set out in the 18th schedule to the Act shall be adopted. One of those precautions is that one-fourth of the cargo is to be in bags, supported on suitable platforms, laid upon the grain in bulk. This section does not apply to the voyage here; but it and sect. 22 of the Act of 1876 show that the Legislature recognized that the carriage of a grain cargo in bulk might involve danger from the cargo shifting, that the danger was one likely to be greater when the voyage was an ocean one, and that there were several well-known precautions (of which putting part of the cargo in bags was one) which were calculated to prevent or lessen this danger. Then the Legislature, with this knowledge, repealed the absolute obligation to adopt some or other of the precautions specified in the Act of 1876, and left it open to the shipowner to adopt *any* precautions he thought proper, whether those formerly made imperative or not, whether

those formerly known, or those which might be subsequently discovered; but, whilst it gave him this option, it threw upon him, in lieu of the former obligation, the responsibility of determining what would be, in each particular case, "the necessary and reasonable precautions to prevent shifting." These precautions would necessarily vary, according to the time of the year, the character of the voyage, the size and build of the ship, and the proportion of the grain to the entire cargo. But in every ship, irrespective of the voyage and of the time of year, there was an obligation to use due care "to prevent shifting." Serjeant Dodd truly says that it lies on the plaintiffs to give evidence that there was a breach of this obligation. I agree. It does not lie on the shipowner, in the first instance, to prove that he used reasonable precautions. It lies on the plaintiffs to show that he did not. Was there evidence to this effect? I am of opinion that there was. In the first place, there is evidence that within a short time after the ship had left Liverpool she foundered, there being no assignable cause for her loss, except the list. This fact is, as I have already said, *per se*, evidence—I think very strong evidence—that the ship was unseaworthy at the commencement of the voyage, and consequently of unseaworthiness at all times thenceforward until the loss. There is evidence that, in a sea which the captain says was then as smooth as a mill-pond, the list commenced; that when the ship reached Lough Swilly, it was 18 to 22 degrees, and that within a few hours afterwards, in weather which it is not pretended ought not to have been anticipated, it had increased until, before the vessel foundered, it had reached 45 degrees. The foundering was caused by the list, and the list is proved by the master and the stevedore to have been caused by the shifting; shifting which commenced long before the vessel reached Lough Swilly. Now, it must be admitted that, with due care, a grain cargo can be so tightly stowed as to be incapable of shifting—at least of shifting so soon after leaving port, and in so smooth a sea. At least a jury might have found that it could have been so stowed. The fact that it did shift without any exceptional cause to account for it is evidence of negligent stowage; and as this stowage caused unseaworthiness, it was a breach of the duty imposed by sect. 458. Again, it was open to the jury to be of opinion that the voyage round the coast

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of Donegal was likely to be as rough as an ocean voyage, and was such as to render reasonable as great precautions against shifting as would be reasonable in such a voyage, and it cannot be left out of consideration that the risk to be guarded against was one which might involve human life, so that the utmost degree of care was due to prevent it.

Then, the parties contemplated the precautions to be used should be by the use of bags. The charter-party provides that the charterer shall *provide sufficient sacks for stowage.* Mr. Fisher, the managing owner, says:—"In all cases I give directions of that kind"—*i.e.*, to have bags for stowage—"as I believe grain is more secure in bags than in bulk." The bags were provided by the charterer, but were not used to any substantial extent, and the jury might well have thought that the reason was that the ship would not hold so large a cargo as 632 tons, if a substantial part of it were in bags. The evidence of Mr. Davis, the stevedore, is distinct that more sacks ought to have been used. He said at the Board of Trade inquiry—"My own judgment suggested I should put in bags this time. . . . I suggested to my foreman it might be necessary to trim the 'Cloughmore' with bags." And on his cross-examination at the trial he said, "I would put half cargo in sacks if I wanted to secure properly; but then the cargo was to be in bulk." Half of this cargo would have amounted to upwards of 3000 bags, whilst 111 only were used. It was open to the jury to disbelieve the defendants' case, that the only necessity for bags was to trim the ship (which is contrary to the note on the bill of lading and the charter-party), and to hold that a much larger quantity ought to have been used, and would have been used were it not that their use, by necessitating a less amount of cargo, would have caused a reduction of freight.

For these reasons, I am of opinion that there is ample evidence to sustain findings 1 (*b*) and (*c*). I must say that I do not think that there was evidence of negligence in shifting-boards not having been provided.

It is unnecessary that I should consider the alleged negligence of the mate in stowing the cargo, for even if the original breach of duty relied on be the negligence in Liverpool, the deaths resulting therefrom are the causes of action, and as reasonable

care on the part of the master in Lough Swilly, would have prevented such deaths, resulting from the alleged negligence of the mate in Liverpool, such negligence cannot be an answer to the action. I am not, however, to be taken as suggesting that there was not evidence that the duty of stowage (save as to checking the amount of the cargo) was handed over to the stevedore, and that the mate was thereby (as found by the jury) relieved from responsibility. As to these matters I say no more than that, deeming their consideration unnecessary, I do not express any opinion upon them.

In result, then, I am of opinion that the order appealed from ought to be affirmed, and the appeal dismissed, with costs.

FITZGIBBON, L.J. :—

Serjeant Dodd stated at the opening of this appeal that the case was supposed to involve very serious consequences to people engaged in carrying on the coasting trade in steamers of this sort. After the Lord Chief Baron's judgment, to go at all into detail would be a waste of time and a presumption on my part; but I wish to add a few general observations on the case from the point of view in which it was presented with such emphasis. It appears to me that the alterations of the law that have taken place from time to time with respect to cargoes of grain in bulk, clearly indicate that cargoes of that class are exposed to one particular danger—namely, that of shifting to a degree likely to cause the wreck of the vessel; there was at first absolutely restrictive legislation, and such cargoes still remain subject to statutory restrictions, enforced by the Board of Trade with regard to ocean-going vessels, and subject to particular provisions with regard to coasting vessels also.

The general rule appears to be, that while specific directions are given with respect to ocean-going vessels to guard against the shifting of cargo, the duty of those in charge of vessels which are not ocean-going is defined to be the duty to take reasonable precautions against the risk of shifting.

Where the word "reasonable" comes in, the jury comes in also, and it is impossible to give a mathematical or specific definition as to what the duty is. But the Court must see that

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there is evidence to show that there was a breach of this duty. I have tried to go further, and to find evidence of some specific negligence, and to see what the reasonable precaution was which ought to have been, but was not, taken.

In the particular case there is a very remarkable series of indications that the stowage of portion of the cargo in bags was regarded by all parties as a thing to be done, or at all events, to be provided for. The charter-party provided that the bags should be provided as required, if necessary. It gave power to require the bags to be furnished if it was thought necessary to use them, and the bill of lading describes the bags that were taken—and describes them twice—as bags "for stowage," that is to say, that they were bags which could be used for the purpose of stowage—a very different thing from putting corn into bags for the mere purpose of enabling the vessel to carry a certain quantity. The charter-party provided for the carrying of as much maize as could be carried in bulk, consistent with reasonable precautions as to proper stowage. The ship did not take all the quantity of grain there was for her to take, and she left part of it behind. No bags of any kind were put down below the deck at all. Below deck, at all events, they were not used for stowage. After all the other compartments into which the hatches were divided were filled with corn, there remained unfilled the coamings—and the coamings only—of the foremost division of the forward hatch. That space was filled with 110 bags which completely filled the space, and thereby helped to consolidate the cargo below, and prevent it from shifting. My impression of the evidence of the skilled witnesses referred to by the Lord Chief Baron is that it goes very far to show that the carriage and use of bags for stowage below deck, with or without the use of platforms below these bags, was not only a due safeguard for this particular voyage, but could not properly be dispensed with for any other voyage. To be seaworthy we must remember that the ship must be built so as to be staunch, and she must be stowed so as to be prepared for sea, and she must be equipped or "found" so as to be reasonably fit for the perils of the sea likely to be met on the voyage on which she is going.

Now, having statutory provisions as to the loading of ocean-

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going vessels, do they not throw some light on the precautions reasonably necessary for the voyage on which this ship was going? Speaking roughly, it must be 500 miles from Liverpool to Galway, where she was to discharge her cargo. What sort of a voyage would this be? Of necessity 300 miles of it was not only ocean-voyage, but it was ocean-voyage in the North Atlantic at about its most dangerous place, and for the time of the year it was a voyage that would require every due precaution to be taken for an ocean-voyage. As to deck cargoes of timber, the statute points out that the season of the year may be taken into account when the deck is permitted to be used. In this particular instance, if I may judge by the event, the unfortunate loss of the ship arose through taking the chance of a summer voyage from Liverpool to Galway, in the hope that there would be summer weather till it was completed. The vessel was filled with corn, under supervision, no doubt, by the stevedore, by shovelling the maize in until it was filled to the coamings of the hatch. It was said that as regards the manner of loading he had a free hand. How did she stand when she went out? I do not believe what the captain said, that the sea was like a mill-pond till she got to Lough Swilly; but if it was, what was to be said for the listing of the ship? How great the list was, we shall see presently. She began to list as soon as she got out of port on the voyage—as soon as her weather side was turned to the Atlantic. She had listed visibly before she got to Lough Swilly; notwithstanding the description that the sea was like a mill-pond, her cargo shifted. The story of the coal, no one can believe. If you compare and look at the cubic contents of the ship, the position of the coal in the ship, and then also consider the contradiction of the witnesses as to the use of the coal, it is impossible to attribute the list to that. The directions to take coal from the other side are contradicted. The captain must have been aware of the list. From the evidence I draw the conclusion that this vessel was not solidly loaded, that there was a space into which the loose grain easily shifted without stress of weather, and with that list she was brought to Lough Swilly. As to the reasons for going into Lough Swilly, I do not want to discount the evidence of the captain; I am willing to believe that the real reason was something wrong about the machinery.

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At all events, she was there for a considerable amount of time, and if the captain had spent that time on board—which he did not—he could have seen what could and ought to have been done. It would have been very easy to do something. At least he might have taken off the hatches in the front division and moved the 110 bags, and, inasmuch as they went down to the bottom of the coaming, he could have seen whether it was possible to shovel over some of the corn, or to get it over, or to shift the bags. If that had been done, it would have done more towards straightening the ship than shifting the coal.

The list was perceptible. I have not the Chief Baron's powers of mathematical calculation. There is no evidence as to what the length of the mast was: the figures are not given. But assuming that the ship was 26 feet wide—then if the mast was 50 feet high, and we are told it was 60, the angle would be 15 degrees; that, at any rate, was a list which was absolutely perceptible. What was the duty of the captain under the circumstances? As to the construction of the section—if the captain finds that his ship is unseaworthy at any point of the voyage at which he is, and if he has the power to restore her seaworthiness, his duty becomes absolute not to go to sea again with an unseaworthy ship, at least unless he is obliged by what is described in the Act as "special circumstances" to continue his voyage. When he was in Lough Swilly the list was there. He did not take even what the Chief Baron calls the initial step of seeing what was wrong, or seeing whether it could be set right. The captain could not be justified in going to sea again with that list, if he could have set it right, or if he could, by reasonable means, have ascertained that it was not safe to go further.

What happened after that speaks for itself. He went out to sea with a falling glass and a north-west wind blowing, and with the weather side of the vessel, from which the list was, turned towards the Atlantic. What happened was the natural result. The moment the grain began to shift, the list increased, and ultimately to such an extent that the jury was, in my opinion, justified in finding that the vessel foundered from this cause.

That would dispose of the case as regards all the members of the crew, except the mate. As to the mate, I must say for myself that, unless it can be explained by the remarks in the

judgment on the finding of the jury that he left his judgment in the matter of the stowage to the stevedore, and only looked after the doing of the work, the finding would be contrary to the evidence. On the other hand, the act of going to sea from Lough Swilly was the act of the captain alone, and I think that the mate thenceforth was in the same position as the rest of the crew towards the owners, if we come to the conclusion that it was the list which caused the foundering, and that it was, if I may say it, "mid-summer madness" to go to sea to meet a westerly gale, knowing that a list to leeward had begun.

I think there was no evidence of negligence in the mere fact that shifting-boards were not used on board this vessel. There is no evidence to support the finding that there should have been shifting-boards on board. The jury were justified in finding that the stowage in Liverpool was not stable; and that the fact that it was not so was known to the captain at a time when he could have taken reasonable precautions or steps to see whether it was so; and if they found that reasonable precautions were not taken, that nothing was done except to "chance it," and go to sea with an unseaworthy vessel, we are not brought to the decision of the question whether the captain was bound to wait for lighters, or the like, because he did not do what he might have done. He was bound to see whether it was possible to restore the stability of the vessel, just as he was bound to see to her proper equipment. The case was well brought within the province of the jury, and the verdict is sustained by sufficient evidence.

I do not feel satisfied as to the finding of the jury regarding what happened at Lough Swilly, and it is difficult to understand it, unless they took into consideration the condition of the vessel at Liverpool. Putting the two things together—that the vessel was not seaworthy at Liverpool, and what occurred afterwards—this finding may, in my opinion, be sustained on the double ground.

WALKER, L.J.:—

I think there was evidence fit to be submitted to the jury in support of the findings, that the vessel became unseaworthy for the voyage by reason of a list existing in Lough Swilly, and that

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such list was caused by the cargo shifting, and that the master could and ought to have corrected the list before resuming the voyage, and that the loss of the vessel was caused by this default.

This would be enough to sustain the verdict, including one for the mate's representatives, because the negligence of the master was the proximate cause of the loss. But, for myself, I think there was evidence fit to be submitted to the jury to support their finding that the cargo was imperfectly stowed in Liverpool by reason of want of proper bagging, though I prefer to rest the verdict on what occurred in Lough Swilly. This was a grain cargo, and both the charter-party and bill of lading contemplated that the cargo in bulk would need sacks for stowage, which were provided by the charterer in sufficient numbers.

There is no doubt that the opinion of the Legislature, expressed in sect. 22 of the Merchant Shipping Act, 1876, was that grain cargoes were dangerous, as liable to shift, and required to be secured from shifting. Bags, sacks, or barrels, or shifting-boards, or bulkheads, are pointed out as securities against shifting.

Sect. 5 of the same Act is the same as sect. 458 in the Act of 1894; and sect. 4 corresponds with sect. 457.

The Merchant Shipping Act, 1880, repealed sect. 22, and substitutes sect. 3—"Where a grain cargo is laden on any British ship, all necessary and reasonable precautions (whether prescribed by this Act or not) shall be taken, in order to prevent the grain cargo from shifting"; and then it makes detailed provisions for ocean-going ships carrying grain.

Sect. 3 is the same as sect. 452 in the Act of 1894. The Act of 1894 (sects. 452, 457, 458) contains the provisions of sect. 3 of the Act of 1880, and sects. 4 and 5 of the Act of 1876. The detailed cautionary provisions, as regards grain in ocean-going ships, are contained in the 18th schedule.

There is no doubt, therefore, that a grain cargo is considered one liable to shift, and, therefore, involving danger to the ship unless it be carefully stowed.

The absence of shifting-boards would not, in a coasting-vessel, be evidence of negligence, nor would the absence of bags determine liability. What a jury is to do is to take into account all the

circumstances in determining whether all reasonable precautions had been taken to prevent shifting. The legislation has pointed out what might be remedies, but leaves in result the employment of sufficient ones to those who are bound to use them.

The jury were entitled to reject the theory advanced by the captain, that the taking of coal from the starboard bunker was the cause of the list in Lough Swilly. It is mere speculation on his part. He never examined the bunker. He did not know the exact quantity in it, and the idea that the coal in the starboard bunker was the best, and, therefore, used first, is not supported by evidence, and, on the contrary, is negatived by the fireman, Maguire, who says he took coal from both bunkers. He differs also from the captain as to the original quantity of coal stowed. He would be more likely to be right. I have no doubt the bunker was capable of holding 50 tons or more. On the evidence, I think the jury were justified in rejecting the coal theory. Mr. Justice Boyd came to the conclusion that it was the dealing with the coal caused the list, and caused the vessel to founder; but this is contrary to the evidence of the captain, and of Davis, so far as the foundering is concerned.

The jury came to the conclusion that it was the shifting of the cargo caused the list, which was apparent in Lough Swilly, and developed till the ship foundered. It is not disputed that in result the shifting of the cargo caused the foundering. Once the shifting began it naturally increased with the roll of the ship, when rough weather was encountered. The captain has given inconsistent accounts of the weather from Liverpool to Lough Swilly. In his protest he says it was rough. In his evidence he says it was as smooth as a mill-pond. The jury were entitled to reject part of his evidence, or adopt part, or even decline to act on it, having regard to its inconsistencies.

The condition of the ship when she arrived in and left Lough Swilly is proved by witnesses whom the jury were entitled to believe. Neill, the chief officer of coastguards, whose evidence has been fully dealt with by the Chief Baron, said the list was dangerous with a cargo of corn, and he says that there was good anchorage between where the vessel lay and the sea. Captain Quirk, an expert witness, with experience in the grain

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trade, says the listing as described would be dangerous, and it would be foolish to go to sea with it, and he adds—what is abundantly clear—grain cargoes are more dangerous for shifting, and he says a vessel listing as described would not be seaworthy. Then he gives his idea of the captain's duty—to trim the cargo if he could, and if not, to discharge wholly or in part, and I think such would be his duty under the 458th section, if it was necessary to keep the vessel seaworthy for the voyage.

Mr. Davis, who was also examined for the plaintiffs, was no doubt an experienced stevedore, and he says he had loaded this vessel many times before; but I think the jury might well conclude that what he was mainly looking to was the quantity of cargo he had to stow, as compared with the capacity of the vessel to receive it, and that he limited his quantity of bags to 111 in order to make room for his cargo. He knew she was going to Galway—a foul passage. He had a free hand from the owners, Fisher, as to stowage of all his vessels. He says, "I would put half the cargo in sacks if I wanted to secure it properly; but this was to be in bulk. If loaded in sacks, it would not fill within 100 tons of her mark; 620 tons could not have been carried in bags." There were plenty of bags for him to draw on, but he only made use of 111. He probably trusted to the coamings acting as feeders and correcting settling. He suggested to the foreman that it might be necessary to trim the "Cloughmore" with bags. He did not personally superintend the packing of the sacks. They were put loosely on the grain, not on boards. He also said he would put half the cargo in sacks if he wanted to secure it properly. If 100 tons were put in bags and placed on board, the cargo would have been less liable to shift, but then he could not get her full. He attributes the loss to the shifting of the cargo. He also says—"I could have used all the bags; they are put on top to steady at the coamings of the hatch; they would fill the belly if there was any sinking of the corn."

I think the jury might well come to the conclusion that in Lough Swilly there was a dangerous list for the captain to pursue his voyage with. The captain knew grain in bulk was dangerous. He knew a grain cargo was liable to shift; but he took no steps to find out the cause of the list. He did not open the hatches. He

says himself 8 degrees of list would be dangerous. He says the list was 5 to 10 degrees in Lough Swilly. Of course, the list increased when he got outside, and the roll of the ship increased the shift, which ultimately became so great that it prevented the ship righting, and caused the foundering in weather not exceptionally rough. He says he could not have corrected the list in reason in Lough Swilly, but his duty under the section was not to go to sea with a vessel which had become unseaworthy, which I interpret as being one which had lost its ability to pursue its voyage safely. He was the person in charge, responsible, and in authority.

The defendants did not ask any question to be left to the jury. They simply insisted on their right to a direction. We were asked what more were they to do. The answer is, they were to take all necessary and reasonable precautions, and if there was evidence to go to the jury that such were not observed, they are liable under the statute for the consequences. As regards what occurred in Lough Swilly, it was said (1) there was no evidence of a list rendering it dangerous to pursue the voyage; and (2), as matter of law, the going to sea was, at most, an act of negligence of the master, which, according to the decision in *Hedley* v. *Pinkney* (1), does not impose liability upon the owners under the 458th section. The findings of the jury dispose of these contentions, so far as they are founded on the facts.

As to the legal contention which was rested on *Hedley* v. *Pinkney* (1) an omission to put up rails and stanchions which had been provided, and were to hand—a defect curable in a few minutes—is a very different thing from a danger affecting the stability of the ship as a sea-going vessel about to pursue a voyage. It is only necessary to read the judgment of Lord Blackburn in the case of *Steel* v. *State Line Steamship Company* (2) to appreciate the difference between the two things. In the one case the meaning of the word "unseaworthy" would be unduly extended to any act of omission to use appliances at hand provided by the owner. The fourth finding is that the master could and ought to have corrected the list before resuming the voyage. He took

(1) [1894] A. C. 222. (2) 3 A. C. 72.

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no step to do this, and it is proved there was safe anchorage in Lough Swilly between where he lay and the sea. Further, upon the 458th section it was his duty to take all reasonable and necessary precautions. He took none. What the steps were, it is not necessary to discuss. Captain Quirk has pointed out some.

If there were any special circumstances justifying him in pursuing the voyage, they have not been found, nor was any question sought to be put in reference to them. I do not think it desirable to go more at length into the evidence, which has been already fully reviewed by the other members of the Court.

I concur that the appeal should be dismissed.

HOLMES, L.J.:—

The plaintiffs in four actions, consolidated by an order of the King's Bench Division, are the representatives of the first officer and three of the crew of the steamship "Cloughmore," who were drowned on the 14th June, 1902, in consequence of that vessel foundering off the coast of Donegal, when on a voyage from Liverpool to Galway, laden with 632 tons of maize. The plaintiffs seek to recover damages from the owners of the "Cloughmore," pursuant to the provisions of Lord Campbell's Act, on the ground that the cause of the deaths of the deceased sailors was a breach by the owners of the obligation imposed on them by the Merchant Shipping Act, 1894, section 458, that "the owner of the ship, the master, and every agent charged with the loading of the ship, or the preparing of the ship for sea, or the sending of the ship to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the voyage." At the trial the jury found the issues submitted to them in favour of the plaintiffs, and the principal subject of argument in this court has been whether there was evidence to support these findings. It was not alleged by the plaintiffs that there was anything in the original construction of the vessel, or in her state of repair at the time of the misfortune, that rendered her unseaworthy. The unseaworthiness complained of was said to have been caused by the mode in which the ship was loaded; and the jury, by their

answers to questions 1 and 2, have found in effect—(1) that the "Cloughmore" became unseaworthy for the voyage by reason of the cargo shifting; and (2) that the cause of this shifting was the omission of certain necessary and reasonable precautions in loading at Liverpool. I am of opinion that there was abundant evidence to support the first of these findings, that *res ipsa loquitur*, and that any other verdict on this issue would have been perverse. My reason for coming to this conclusion is that it appears, from uncontradicted testimony, that the vessel left Liverpool on an even keel at 1 o'clock, a.m., on the 12th June; that the weather was fine until she reached Lough Swilly at about 6 o'clock, a.m., on the 13th; that about 3 a.m. on that morning it was noticed that she had a list to port, which increased gradually while she was in motion until shortly before she foundered; that it then began to increase rapidly, and that at length it became so great as to lead to the loss of the ship. The master proved that the immediate cause of the disaster was the shifting of the cargo; and the reasonable inference is that the list from first to last came from the same source. The master says that when he first noticed it, he attributed it to an undue proportion of coal for the engines having been taken from the starboard bunker; but the fact that the list continued to increase after this was corrected, shows that he was mistaken. We have, therefore, a vessel preparing for a voyage, in the latter portion of which severe weather is more the rule than the exception, loaded in such a way as that the cargo began to shift in fine weather in a comparatively safe sea, and continued to shift more and more until in consequence thereof the ship went down. For these reasons, I am of opinion that the jury were justified in finding that the "Cloughmore" became unseaworthy for the voyage by reason of the cargo shifting.

I come now to the other finding—that the cause of the shifting was the omission of certain necessary and reasonable precautions in loading at Liverpool. I am disposed to think that, from the circumstances which I have enumerated, the jury would have been at liberty to draw the inference that there had been some neglect in loading the cargo, even if they were unable to indicate the precise nature of the neglect. But a

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finding of this kind, although in certain circumstances permissible, is never satisfactory, and I am glad that the jury have indicated what was the want of precaution to which they attributed the shifting of the cargo. They have found that the stowage was improper by reason of improper bagging. Was there evidence of this? It was proved that coasting-vessels often carry maize stowed altogether in bulk, and that the "Cloughmore" had done so on many voyages. But it also appears that it is usual, or at least not unusual, where a considerable part of a cargo of maize is in bulk, to add thereto a quantity of maize in sacks for the purpose, not only of trimming the vessel, but also of keeping the bulk firm and steady. Having regard to this evidence, while I cannot assume, on the one hand, that in all cases a vessel is unseaworthy which carries on a coasting voyage maize in bulk, without bags or other precautions against the cargo shifting, I am led, on the other hand, to hold that in some cases loading the cargo wholly in bulk would be evidence of want of due care. It depends upon the circumstances of the case, including the season of the year, the length of the voyage, the sea to be traversed, and whether the maize is sufficient to fill the hold and coamings in all their parts, and to their full capacity. There is evidence—indeed evidence on the point is hardly required—that the coast off Donegal is bad, and the stevedore described the voyage to Galway as a foul passage. It was contemplated from the first that bags were to be used to some extent on this occasion. The master seems to have communicated with the owners on this subject. Bags are referred to in the charter-party. The stevedore intended that some bags were to be used for safety, and as a matter of fact 111 bags were shipped for stowage purposes, as appears in the bill of lading. The stevedore was not himself present when these bags were put on board, and there was evidence from which the jury might infer that they were stowed in such a way as to add nothing to the stability of the cargo. There is, moreover, a remarkable statement of the stevedore from which I gather that, in his opinion, there was not a sufficient number of bags to ensure safety. He said, "I would have put half the cargo in sacks if I wanted to secure properly; but then this was to be in bulk." The meaning of this, as shown by his subsequent answers, is that he omitted a

reasonable precaution for the sake of carrying a larger quantity of maize, and of thus earning a greater freight. In my opinion the several matters I have referred to justify the finding of the jury —that all necessary and reasonable precautions were not taken to prevent the maize from shifting, inasmuch as the stowage was improper by reason of improper bagging. The result then would be that there ought to be judgment for at least three of the plaintiffs.

There is, however, a difficulty in the case of Mrs. Townley, who represents the first officer. The jury found that he was not responsible for the omission of the necessary and reasonable precautions in stowing. I do not think that this is in accordance with the evidence. It is a matter of common knowledge that it is the duty of the first officer to superintend the loading and unloading of his ship; and I am of opinion that he is not relieved from this duty by the circumstance that the stevedore is nominated by the owners. I fear that the jury were misled by some of the statements made by the stevedore in his deposition at the Board of Trade inquiry. He said, for example, that he was given a free hand; but I do not understand by this that he was to take the place of the responsible officer who was present during the loading, seeing and, at least on one occasion, interfering in what was done, and who, according to the stevedore's evidence, was to be consulted by his foreman in reference to the bagging.

If there were nothing further in the case, and if no other issues had been found save those I have already referred to, I fear that I could not assent to the judgment for Mrs. Townley; but even in that case I have not formed a decided opinion as to whether judgment ought to be given against her, or a new trial directed, on the point of her husband's responsibility. The jury, however, have found that the master ought to have corrected the list before leaving Lough Swilly, and that the loss of the vessel was caused by this default on his part, as well as by the defective stowage at Liverpool. The statute imposes on the shipowner the obligation that the master shall use all reasonable means to keep the vessel in a seaworthy condition during the voyage; and it is argued that the list ought to have shown the master that she was not fit, in her then state, to face the winds and waves of the Atlantic. Now, I think that

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the evidence of the coastguards goes to prove that the list was serious when they saw the ship near Rathmullen, and might become dangerous; and if this were so, the jury would have been justified in holding that the master was negligent in not discovering its cause. With a small degree of care he could have found that it arose from the shifting of the cargo; and in such case if he could have employed any reasonable remedy he ought to have resorted to it. The issue found by the jury implies that he could have done something to steady the cargo; but they have not said what this something is, and there is no evidence on the subject. I think that it would have been necessary to unload a quantity of the maize in bulk, and to re-ship it in bags—an operation that could be only carried out in port, and there is no port in Lough Swilly. Londonderry might have been reached; but I doubt if any captain in the same circumstances would have seriously contemplated going there. With small acquaintance with maritime affairs, but with some knowledge of human nature, I have formed the opinion that a master possessing the average degree of care and skill, having reached the mouth of Lough Swilly in favourable weather, and realising that the list in his vessel was caused by a shifting cargo, would have continued his voyage without interruption and with all speed, in which case he would probably have reached Galway in safety. In going to Rathmullen without sufficient cause, and in lying there at anchor for fourteen hours of a summer day, the master of the "Cloughmore" made a mistake; but I am not sure that it was such a mistake as the owners are responsible for under the 458th section. In this branch of the case, which is only of importance in relation to the claim of one of the plaintiffs, I feel some difficulty; but the jury, or some of them, probably knew much more than I do about what might have been done by a careful master to improve the condition of the vessel, and I am prepared to accept their verdict.

Solicitor for the plaintiffs: *A. N. Sheridan.*
Solicitors for the defendants: *Fisher & Fisher.*

R. D. M.

CARRICKFERGUS URBAN DISTRICT COUNCIL *v.* MARTIN (1).

K. B. Div. 1905. Nov. 1, 2, 8.

Landlord and tenant—Lease—Covenant to pay rent—Fair rent order—Yearly tenancy—Arrears of rent—Specialty debt—Appropriation—Land Law (Ireland) Act, 1881, *sect.* 21—*Land Law (Ireland) Act*, 1887, *sect.* 1—*Land Law (Ireland) Act*, 1896, *sect.* 16.

1. Where, under the provisions of sect. 1 of the Land Law (Ireland) Act, 1887, a lessee is deemed to be tenant of a present tenancy in like manner and subject to like conditions as if his lease had expired, and a fair rent is fixed in respect of such tenancy, the landlord cannot sue in covenant for arrears of rent ascertained by the fair rent order accruing after the lease is deemed to have expired.

2. The sum of two years' rent, payment or lodgment of which is prescribed by section 16 of the Land Law (Ireland) Act, 1896, in order to entitle a tenant to redeem when the rent in arrear exceeds two years' rent, refers to the two years' rent last due, and the landlord cannot appropriate such payment or lodgment towards earlier arrears of rent.

Quære, whether from such payment or lodgment a promise to pay arrears can be inferred.

CASE STATED by the Right Hon. Mr. Justice Kenny, on the hearing of a civil-bill appeal, at the Belfast Summer Assizes, 1905, as follows:—

The civil-bill process in this case was brought for recovery of the sum of £28 5*s.*, being over eight years' arrears of rent alleged to be due by the defendants to the plaintiffs, up to and ending 1st May, 1901, in respect of premises in Carrickfergus.

The defendant's yearly rent was £3 10*s.* It was fixed at that sum by order of the Land Commission, dated the 28th October, 1892, made pursuant to sect 1 of the Land Act (Ireland), 1887.

The defendant had, up to that period, held the premises under an indenture of lease, dated the 30th of September, 1875, for a term of sixty-one years, at the yearly rent of £5, which indenture contained the usual covenant by the lessee for payment of the rent.

(1) Before ANDREWS, GIBSON, and BOYD, JJ.

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On the 24th January, 1902, the plaintiffs obtained a civil-bill decree against the defendant for the possession of these premises, grounded on non-payment of rent during the years from 1st May, 1891, to 1st May, 1901.

By the last-mentioned decree it was determined that the holding was one to which the 7th section of the said Act of 1887 applied, and that same was not in the occupation of a tenant within the 12th section of the Land Law (Ireland) Act, 1896, and that the defendant was not an immediate landlord of the holding within the meaning of the same section.

It was also ascertained by the said decree that the sum of £35 5*s.* was due to the plaintiffs for arrears of rent up to and including the gale thereof which accrued due on the 1st May, 1901, being the gale-day next before the said action.

Pursuant to the 16th section of the Land Law (Ireland) Act, 1896, the defendant subsequently paid to the plaintiffs, or lodged with the Clerk of the Peace, the sum of £7, being two years' arrears of rent of the premises, together with the costs of the ejectment, whereupon an order for a writ of restitution was made.

The sum of £28 5*s.*, the subject-matter of the present action, is claimed as being "eight years' rent, and arrears of the said judicial rent," up to and ending the 1st May, 1901.

The plaintiffs, so far as it was competent for them to do so, appropriated the £7 so paid by the defendant to the discharge of the two years' rent which accrued due on 1st May, 1893, and sued for eight years' rent (and 5*s.* arrears) from 1st May, 1893, up to and ending the 1st May, 1901.

There was no evidence that the defendant assented to the aforesaid, or in fact any particular, appropriation of the said payment of the sum of £7.

The County Court Judge gave a decree for the sum claimed by the plaintiffs, the defendant not appearing at the hearing in person or by solicitor or counsel. The decree is dated the 18th October, 1904.

The defendant appealed; and the appeal was heard before me, at Belfast, for the county of Antrim, on 16th March, 1905.

The only question that arose before me was as to the application of the Statutes of Limitation. The plaintiffs contended that

the lease of the 30th September, 1875, should be regarded as still subsisting, subject to modification as to the amount of the yearly rent, and that they were entitled to recover the full amount claimed as a specialty debt.

The defendant's case was that the plaintiffs were entitled to recover only four years' arrears, being six years' arrears to 1st May, 1901, less by the two years paid or lodged.

The plaintiffs also contended that if they were wrong in their submission, the payment or lodgment by the defendant of the £7 had taken the case out of the statute.

On the question of specialty debt the following cases were cited:—*Bolton* v. *Barry* (1); *Bruce* v. *Steen* (2); *Sturges* v. *Ryan* (3); *O'Connor* v. *Smith* (4); *Mollan* v. *Kieran* (5); *In re Ruttledge's Estate* (6); *Irish Land Commission* v. *Magorian* (7); *Wilson* v. *Smyth* (8); *Glenny* v. *Bell* (9); and on the question of appropriation: *Eyre* v. *Coen* (10); *Baker* v. *Murphy* (11); and *Tweedy* v. *Ward* (12).

If any amendment in the civil bill were necessary for the purpose of raising the question of a specialty claim, I would have made it.

The questions on which the opinion of the Court is asked are:—(1) Is the plaintiffs' demand to be regarded as recoverable under the lease of 1875, and therefore a specialty debt? (2) Is it a mere simple contract debt? (3) Assuming that the plaintiffs appropriated the payment of the £7 to the gales of rent due in May, 1893, was it competent to them to so appropriate it, having regard to the 16th section of the Land Law (Ireland) Act, 1896, and so take the case out of the Statute of Limitations?

If the first or third question be answered in the affirmative, the decree of the County Court Judge is to be affirmed with costs in the Court below, and £4 12*s.* costs of the appeal.

If the first and third questions be both answered in the negative,

(1) 12 L. R. Ir. 158.
(2) 14 L. R. Ir. 408.
(3) 24 L. R. Ir. 305.
(4) 20 L. R. Ir. 393.
(5) [1894] 2 I. R. 27.
(6) [1895] 1 I. R. 328.
(7) [1901] 2 I. R. 445.
(8) 23 I. L. T. R. 7.
(9) [1898] 2 I. R. 233.
(10) [1898] 2 I. R. 761.
(11) 3 I. W. L. R. 97.
(12) 1 New Ir. Jur. 272.

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the decree is to be reduced to £14, being four years' rent with costs in the Court below, and £2 13*s.* 6*d.* costs of the appeal.

James Andrews, for the plaintiffs :—

The twelve-year limit fixed by 37 & 38 Vict. c. 57, s. 1, does not apply to rent reserved by an indenture of demise: *Donegan* v. *Neill* (1); and if, as I contend, the plaintiffs' action is one on foot of a specialty debt, they are entitled to recover the full amount claimed. The fixing of a fair rent on the 28th October, 1892, did not, save as regards the *amount* of the annual rent, affect the provisions of the lease, which are in no wise inconsistent with the statutory conditions imposed on the holding by the 1st section of the Land Law (Ireland) Act, 1881, and the lease still remains an undetermined lease containing a covenant to pay the rent: *Bruce* v. *Steen* (2) and *Knox* v. *Baxter* (3). *Sturges* v. *Ryan* (4) does not rule the present case; the fair rent was there fixed in the name of an assignee in possession, and it was held that the fixing of a fair rent in a proceeding to which the original lessee was not a party destroyed all privity of contract between the lessor and such lessee. Section 21 of the Land Law (Ireland) Act, 1881, expressly enacts that where existing leases have expired, the lessees, if *bona fide* in occupation of their holdings, shall be deemed to be tenants of present ordinary tenancies from year to year at the rents, and *subject to the conditions, of their leases*; and by virtue of section 1 of the Land Law (Ireland) Act, 1887, the defendant, having applied in the prescribed manner, was deemed to be tenant of a present tenancy "in like manner, and *subject to like conditions*," as if his lease had expired.

The decision in *Bolton* v. *Barry* (5) shows that the covenants in the lease there in question were not determined by the fixing of a fair rent. In *Wilson* v. *Smyth* (6) O'Brien, J., observed :— "As far as I can see there is nothing in the 1st section of the Act of 1887 determining the lease, which should therefore be treated as still subsisting at the new rent." The cases in

(1) 16 L. R. Ir. 309.
(2) 14 L. R. Ir. 408, at p. 426.
(3) 19 L. R. Ir. at p. 465.
(4) 24 L. R. Ir. 305.
(5) 12 L. R. Ir. 158.
(6) 23 I. L. T. R. 7.

which the Courts have held that the fixing of a fair rent has not affected the liability of a tenant under a fee-farm grant to pay tithe rentcharge are all in my favour as showing that the old tenure remains: see judgment of Monroe, J., in *Re Ruttledge's Estate* (1). In *Irish Land Commission* v. *Magorian* (2) Kenny, J., says:—"Under the Act of 1887, section 1, the leaseholder who gets a fair rent fixed does not, in my opinion, thereby annul his lease for all purposes."

[He also referred to: *Glenny* v. *Bell* (3); *O'Connor* v. *Smith* (4); *Mollan* v. *Kieran* (5); *Cope* v. *Gabbett* (6); and *Irish Land Commission* v. *Brown* (7).]

As to appropriation, I submit that section 16 of the Act of 1896 does not itself effect an appropriation of the two years' rent paid or lodged to the last two years in respect of which rent accrued due; and that as the tenant did not specifically appropriate, the landlords had power to, and did in fact, appropriate by virtue of the creditor's common law right of appropriation: *Eyre* v. *Coen* (8), *Baker* v. *Murphy* (9), and *Tweedy* v. *Ward* (10) are all reconcilable on this basis.

T. Harrison, for the defendant:—

The plaintiffs are only entitled in this action to recover four years' arrears of rent, that is, six years' arrears to 1st May, 1901, less by the two years' rent paid by the defendant under section 16 of the Land Law (Ireland) Act, 1896. In order to recover more than six years' arrears of rent, the action must be one brought under an indenture of demise or an actual specialty covenant. There must be a specific sealed agreement. Here the lease of 30th September, 1875, if not absolutely at an end for all purposes, was, as between the parties in this action, at least, in suspense.

The position of the defendant was analogous to that of an overholding tenant after the expiration of his lease. The lease must be treated as if it had become determined by efflux of time:

(1) [1895] 1 I. R. 328.
(2) [1901] 2 I. R. 445, at 461.
(3) [1898] 2 I. R. 233.
(4) 20 L. R. Ir. 393.
(5) [1894] 2 I. R. 27.
(6) [1904] 2 I. R. 234, 256.
(7) *Ibid.* 200.
(8) [1898] 2 I. R. 761.
(9) 3 Ir. W. L. R. 97.
(10) 1 New Ir. Jur. 272.

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section 21 of Land Law (Ireland) Act, 1881; section 1 of Land Law (Ireland) Act, 1887; section 1 of the Redemption of Rent (Ireland) Act, 1891. The lease having become so determined, the defendant held under an ordinary parol tenancy, into which the conditions of the lease—so far as not inconsistent with the statutory conditions—are to be read; but he no longer held under seal, nor can he now be sued in covenant.

None of the cases cited rule the present, but *Sturges* v. *Ryan* (1) and *M'Evoy* v. *M'Evoy* (2) are in favour of my contention; the decision of Madden, J., in *Irish Land Commission* v. *Magorian* (3) is reconcilable with the defendant's case, as the lease may not be determined as against outside parties whilst it is as between landlord and tenant.

As to appropriation, I rely on the words of section 16 of the Land Law (Ireland) Act, 1896, itself, which effect a statutory appropriation of the amount paid to the last two years in respect of which rent has accrued due.

Andrews, in reply:—

By section 1 of the Act of 1887 the lessee is only *deemed* to be a tenant of a present tenancy from year to year in so far as is necessary for the purpose of fixing a fair rent; see judgment of Fitz Gibbon, L.J., in *Irish Land Commission* v. *Brown* (4). The lease cannot, as contended for the defendant, be determined *inter partes*, and not determined as between the lessee and third parties.

Nov. 8.

ANDREWS, J.:—

This case came before us on a case stated for the opinion of this Court by Mr. Justice Kenny on the hearing of an appeal from a civil-bill decree obtained by the plaintiffs against the defendant in an action to recover £28 5*s*. for a little over eight years' arrears of rent claimed to be due by the defendant to the plaintiffs up to the 1st May, 1901, in respect of a holding in Carrickfergus. The civil bill on which this decree was made was dated the 18th of October, 1904.

(1) 24 L. R. Ir. 305.
(2) [1897] 1 I. R. 295.
(3) [1901] 2 I. R. 445.
(4) [1904] 2 I. R. at p. 208.

The lands comprised in the holding had been held by the defendant from the plaintiffs under a lease, dated the 30th of September, 1875, for sixty-one years at the yearly rent of £5; and the lease contained the usual covenant by the lessee for payment of the rent.

By an order of the Land Commission, dated the 28th of October, 1892, and made under the 1st section of the Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33), the rent reserved by the lease was reduced, and fixed at the yearly rent of £3 10*s.*

On the 24th of January, 1902, the plaintiffs obtained a civil-bill decree against the defendant for the possession of the premises for non-payment of rent for ten years, from the 1st of May, 1891, to the 1st of May, 1901.

It was ascertained by this decree that the sum of £35 5*s.* was due to the plaintiffs for arrears of rent up to the 1st of May, 1901, being the gale-day next before the civil-bill action for possession. Pursuant to the 16th section of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), the defendant (as reported in the case stated) "paid to the plaintiffs, or lodged with the Clerk of the Peace, the sum of £7, being two years' arrears of rent of the premises, together with the costs of the ejectment, whereupon an order for a writ of restitution was made"; and in the present action the sum of £28 5*s.* was claimed for eight years, and 5*s.* arrears of the fixed reduced rent up to the 1st of May, 1901.

The plaintiffs had purported to appropriate the £7 so paid or lodged to discharge the first two years' rent of the ten years' arrears, viz., the two years ending the 1st of May, 1893, and the civil bill in the present action was brought to recover the remaining eight years' arrears, and 5*s.* previous arrear up to the 1st of May, 1901, amounting to £28 5*s.*, for which the plaintiffs obtained the decree appealed against. The first question reserved by Mr. Justice Kenny for the opinion of the Court is as follows:—"Is the plaintiffs' demand to be regarded as recoverable under the lease of 1875, and therefore a specialty debt?" In my opinion, this question is determined by the cases of *Sturges* v. *Ryan* (1) and *M'Evoy* v. *M'Evoy* (2). In the case of *Sturges* v. *Ryan* (1) the Queen's Bench

(1) 24 L. R. Ir. 305. (2) [1897] 1 I. R. 295.

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Division decided that an order of the Land Commission, under the Act of 1887, fixing a fair rent on the application of an assignee of a lease discharged the original lessee from liability to rent subsequently accruing due. The learned Judges who decided that case were unanimous in the decision arrived at, though not by identical reasoning. I think it sufficient, however, to refer to the decision without entering upon an examination of the considered judgments. In the later case of *M'Evoy* v. *M'Evoy* (1) the Master of the Rolls decided that a lessee for an estate for a life in being so limited as to make his heirs special occupants on his death intestate, who had obtained an order of the Land Commission under section 1 of the Act of 1887, had acquired the *status* of a present tenant, and that his interest in the demised land on his death intestate formed part of his personal estate. In a considered judgment the Master of the Rolls held that by the operation of the order fixing the fair rent (having regard to the Act of 1887, sect. 1, and the Act of 1881, 44 & 45 Vict. c. 49, sect. 21), the lease was terminated and gone, though such of its provisions as would have survived, and bound a yearly tenancy, created by overholding after its expiration, were by law introduced into, and incorporated with, the statutory tenancy from year to year, save so far, if at all, as they would conflict with the *status* of a present tenant.

I think these decisions—which have not been overruled—are binding upon this Court in the present case. There has, no doubt, been much diversity of judicial opinion on the question, as to which I need not do more than refer to the recent case of *The Irish Land Commission* v. *Brown* (2) in the Court of Appeal, and the several cases therein referred to, including *Ruttledge's Estate* (3), *The Irish Land Commission* v. *Magorian* (4), and the judgments in *Brown's Case* (2) of Fitz Gibbon, L.J., Walker, L.J., and Holmes, L.J; but, notwithstanding this diversity of opinion, the cases of *Sturges* v. *Ryan* (5) and *M'Evoy* v. *M'Evoy* (1) have not been overruled, and, as I have stated, they, in my opinion, remain binding authorities on this Court in the present case. Being such, I refrain from any expression of opinion as to whether they were

(1) [1897] 1 I. R. 295.
(2) [1904] 2 I. R. 200.
(3) [1895] 1 I. R. 328.
(4) [1901] 2 I. R. 445.
(5) 24 L. R. Ir. 305.

rightly decided, which is not for me to offer, and is for the Court of Appeal to determine, whenever, either in the present or any other case, it may become necessary to do so. The first question reserved by Mr. Justice Kenny in the present case must therefore, in my opinion, be answered in the negative—namely, that the plaintiffs' demand in the present case is not to be regarded as recoverable under the lease of 1875, and is not therefore a specialty debt. It follows that the second question reserved by the special case must be answered in the affirmative—namely, that the plaintiffs' demand is only a simple contract debt.

The third question reserved by the special case is as follows:—"Assuming that the plaintiffs appropriated the payment of the £7 to the gales of rent due in May, 1893, was it competent to them to so appropriate it, having regard to the 16th section of the Land Law (Ireland) Act, 1896, and so take the case out of the Statute of Limitations?"

I am of opinion that it was not competent to the plaintiffs to so appropriate the payment of the £7. The special case states, as I have already mentioned, that the defendant "paid to the plaintiffs, or lodged with the Clerk of the Peace," this sum of £7. No consent to the appropriation in question is stated or found to have been given by the defendant, which distinguishes this case from the case of *Eyre* v. *Coen* (1), the decision in which I was a party to, and which, as the report of that case in 33 I. L. T. 57 shows, was given upon the ground that the two years' rent therein referred to was both paid and accepted in respect of the first two years' arrears, as appeared from the receipt which was given and accepted for it. That case left the question now before us open, and undetermined. The case of *Baker* v. *Murphy* (2) (May, 1897), however, appears to be a decision on this question. It is unfortunate that the only report of it seems to be the very meagre report given in 3 Irish Weekly Law Reports, 97, which does not supply either the arguments or the judgments. The case, however, was heard by a Court of four Judges of the Queen's Bench Division, of whom Mr. Justice Gibson was one; and I gather from the report that the opinion of the Court was that the two years' rent upon

(1) [1898] 2 I. R. 761. (2) 3 I. W. L. R. 97.

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payment or lodgment of which the tenant may redeem under sect. 16 of the Act of 1896 are the two years' rent last accrued due. This further appears from the judgment of Mr. Justice Gibson in the case of *Tweedy* v. *Ward* (1), in which, in a civil-bill appeal, he is reported to have said that four years ago (referring apparently to *Baker* v. *Murphy* (2)) he had made up his mind on the question, and that the Court had decided after argument that the two years' rent must be appropriated to the two last years' rent, and that the yearly rent of these two years determined the amount of the redemption money.

After a careful consideration of the 16th section of the Act of 1896, I have come to the conclusion that this is the correct view. The two years' rent therein referred to by payment or lodgment of which the tenant may redeem is described as a sum upon payment or lodgment of which the tenant shall be in the same position under the redemption sections of the Act of 1860 as if two years' rent were the sum due for rent up to the date of the commencement of the proceedings in the ejectment, and the section goes on to provide that the balance of the rent due to that date shall be recoverable by the landlord as if the same were a debt due to him by the person legally liable therefor, but shall not be recovered by ejectment for non-payment of rent or distress. These provisions appear to me to show sufficiently, though less clearly than could be desired, that the two years' rent to be paid or lodged, in order to entitle the tenant to redeem when more than two years' arrears of rent is due, are the two years' rent last due, which become discharged by such payment or lodgment. There are other considerations which may support this view, including that of a case in which a reduced rent has been judicially fixed, and the arrear of rent consists partly of the old, and partly of the reduced rent, as was the case in *Baker* v. *Murphy* (2).

As regards costs, the defendant having succeeded on all the questions reserved by the case stated, the plaintiffs should pay him his costs of the case stated and the argument thereon; and our order will now be sent to Mr. Justice Kenny to enable him to prepare his decree on the appeal.

(1) 1 New Ir. Jur. 272. (2) 3 I. W. L. R. 97.

GIBSON, J.:—

Both the questions argued are important. The first is, Can a lessee, who has obtained a fair-rent order reducing his rent, be sued for that rent as a specialty debt, notwithstanding that the lease is deemed to have expired? The second is, On payment or lodgment by the tenant of two years' rent, without specific appropriation, can the landlord without the tenant's consent appropriate such sum in payment of any bygone arrears of rent, outside the last two years?

1. The cases discussed at the Bar fall into three classes. The first consists of cases relating to liabilities of the leasehold or fee-farm lands to third parties. *Brown's Case* (1) is the last of this type, and the *ratio decidendi* of the Court of Appeal there has no direct bearing on the present problem which arises between landlord and tenant, parties to the fair-rent order. This class of cases is useful only for *dicta* found in the judgments; but such *dicta* are unfortunately contradictory, and I do not deem it necessary to discuss them in detail. On one side are ranged Monroe, J., Kenny, J., and possibly Fitz Gibbon, L.J., who favour the view that the lease or grant continues in fact to subsist, the statutory fiction of expiration being limited to the purpose of giving the leaseholder or grantee the rights of a present yearly tenant against his lessor or grantor. On the other side, Madden, J., and Holmes, L.J., supported by O'Brien, J., Johnson, J., Porter, M.R., and possibly Palles, C.B., hold that the lease or grant must be deemed to be actually expired. The second class of case relates to the nature of the lessee's estate, and is illustrated by *M'Evoy's Case* (2), where Porter, M.R., concurring with what was apparently Chatterton, V.-C.'s, opinion, held that the estate of the lessee was, so far as regards the lessee and those claiming under him, converted into a chattel tenancy from year to year. These latter decisions are all one way, and as they were appealable and have never been overruled, we are bound by them. The third type of case deals with the rights of landlord and tenant, *inter se*, and may be subdivided into two sub-classes. The first is represented by *Wilson* v.

(1) [1904] 2 I. R. 200. (2) [1897] 1 I. R. 296.

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Smyth (1), following and applying *Bolton* v. *Barry* (2). This latter case decided, O'Brien, J., dissenting, that, under section 21 of the Act of 1881, a covenant in an expired lease, as to a certain sum as security, was one of the contract terms carried into the springing yearly tenancy. The decision was affirmed by the Court of Appeal, whose judgments are not reported; but I believe that the ground of decision was the point noticed by Morris, C.J., below, that there was no privity to support a set-off. This case, which is manifestly not in point here, was applied by O'Brien, J., in *Wilson* v. *Smyth* (1), to the case of a lessee who had obtained a fair-rent order under the Act of 1887. The only importance of the latter case is that the report conveys that the learned Judge indicated an opinion that the lease was not determined, and might be treated as subsisting at the new rent. I am by no means satisfied that he meant more than that the terms of the lease continued to operate as part of the tenancy contract. But the *dictum*, if in point, is of no value, as it is opposed to the express decision of the same learned Judge subsequently in *Sturges* v. *Ryan* (3), where he held that the lease was actually determined, and the covenant attached to the term was at an end.

The second sub-head of cases relating to the landlord's contract rights is represented by *Sturges* v. *Ryan* (3), where it was held that a lessee was no longer bound by his covenant for rent accruing after his assignee had obtained a fair-rent order. Two of the Judges founded their judgments on the position that the lease must be dealt with as actually defunct, so that the covenant, as covenant, was gone. On their view, the result would have been the same if the lessee himself had procured the judicial tenancy. The two other Judges, Murphy, J., and myself, without deciding that the lease was in fact at an end, held that the lessee was absolved—Murphy, J., on the ground that the relation established between the lessor and the assignee was inconsistent with the lessee's liability in covenant; while my judgment proceeded on the view that the statutory hypothesis excluded the continuance of the lessee's liability, which was limited to the duration of the term. The decision appears to me to rule the question before us. A

(1) 23 I. L. T. R. 7. (2) 12 L. R. Ir. 158. (3) 24 L. R. Ir. 305.

lessee who has assigned is not a surety: *Baynton* v. *Morgan* (1); and if a lessee is not liable in covenant, where the rent has been reduced on his assignee's application under section 1 of the Act of 1887, the same consequence in principle should follow where the order is obtained by himself. The lease is a specialty which binds the lessee to pay a contract rent for a fixed time. The present tenancy created by the statute incorporates the terms of the lease, so far as the same are not displaced by the fair-rent order or statutory provisions, but the tenant no longer holds for a fixed term, but for a series of renewable statutory terms at a rent variable from time to time; such rent does not depend on contract, but on an adjudication based on calculation of the respective interests of the landlord and tenant, and governed by statutory rules and conditions; the tenant is subject to notice to quit; the landlord is given a right of resumption; and the limit of time prescribed by the indenture disappears.

The case of *Cope* v. *Gabbett* (2), deciding that the present tenancy in that case was circumscribed by the contract duration of the lease, has no application to a lease falling within section 1. How can a liability in covenant, based on contract for a term, apply to the fair rent under the new conditions? The section nowhere conveys that the new rent is to be written into the lease. The lease must be construed as it stands. Suppose the rent was increased, could the former lessee be sued in covenant to recover it? Whether the new rent is higher or lower, it is a statutory creation not contemplated by the covenant.

Several modes of giving lessees the benefit of the three F's might be conceived, but the method adopted was by accelerating the expiration of the leases, and at once bringing them within sect. 21 of the Act of 1881. To carry out this plan, fiction was indispensable. As long as time exists, future cannot be made *in fact* present, and the Legislature had to work on the hypothesis that existing leases were to be treated as actually expired. The terms of the lease, so far as applicable, are read into the new yearly tenancy, which is a reality, not a fiction. The view that the new terms are to be introduced into the lease, treated as an unexpired

(1) 22 Q. B. D. at p. 80. (2) [1904] 2 I. R. 234, 256.

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and effective contract, is quite impossible, and there is nothing in the statute to justify such alteration and enlargement of an instrument under seal. The living tenancy is that arising out of the fair rent order. What is left of the lease when its duration is gone, its rent changed, and the tenant is in the position of a yearly tenant subject to notice to quit, and the exercise of the power of resumption? If it preserves its existence, it can only be as a metaphysical entity. The new relation of present tenant is an actual one, and how, as between landlord and tenant, a relation based on contract—a freehold lease, or lease for a term, can, legally or at all, co-exist with a yearly tenancy between the same persons in the same lands without limit of time, and at a new rent, passes my ability to reconcile with any legal principle. The case of *Kearns* v. *Oliver* (1) illustrates the impossibility of reconciling the statutory relation with the old contract covenant.

It was argued that, under sect. 21 of the Act of 1881, covenants in an expired lease bound the new present tenant, and that rent accruing after such expiration constituted a specialty debt. This argument requires no answer.

In my opinion this Court is bound by authority to hold that the landlord cannot sue in covenant for rent, ascertained by a fair-rent order, accruing after the lease is deemed to have expired; and if there was no authority, my conclusion would be the same.

In *Sturges* v. *Ryan* (2) I suggested an opinion that under an indenture of demise creating a yearly tenancy, where a fair-rent order had been made under the Act of 1881 (as in *O'Connor* v. *Smith* (3)) the tenant would be liable for such fair rent as a specialty debt if the fair rent did not exceed the contract rent. This now appears to me more than doubtful. As, however, the point does not arise in the present case, which depends entirely on the assumed expiration of the lease under the Act of 1887, it is unnecessary to do more than express my doubt.

The second point, as to appropriation, was decided by the full Court in *Baker* v. *Murphy* (4), which, without knowing that the case had been reported, I followed in *Tweedy* v. *Ward* (5). The

(1) 24 L. R. Ir. 473.
(2) *Ibid.* 305.
(3) 20 L. R. Ir. 393.
(4) 3 I. W. L. R. 97.
(5) 1 New Ir. Jur. 272.

subsequent case, *Eyre* v. *Coen* (1), does not conflict with *Baker* v. *Murphy* (2), as the appropriation there was made with the tenant's assent. Having reconsidered the matter, I remain of the opinion expressed in *Baker* v. *Murphy* (2), that sect. 16 contemplates payment of the last two years' rent, and the payment or lodgment is presumed to be on foot of that rent. Each year is subject to different income tax and poor rate deductions. The provisions of the Bankruptcy Acts, as to rent and wages, supply an analogy: 12 & 13 Vict. c. 106, sect. 129; 32 & 33 Vict. c. 71, sect. 34; and our statute of 1857, sect 321. Section 47 of Deasy's Act points in the same direction. Apart from any statutory presumption, the tenant could appropriate, and the inference of appropriation may be drawn from the nature and circumstances of the payment without any express declaration of intention. If the landlord could appropriate, he might apply the lodgment to rent which was statute-barred. Even without the provision in sect. 16, I would be inclined to hold that the tenant should be presumed here to have lodged the money in satisfaction of the last two years.

A further point mentioned incidentally in the case, but as to which no question has been put, and no argument advanced, is whether the payment was such as to raise an inference or promise to pay which would exclude the Statute of Limitations. I need not decide the point, as we are not asked to do so; but the cases of *Davies* v. *Edwards* (3) and *Morgan* v. *Rowlands* (4) point to a negative answer. If the rent is appropriated to the last two years, no promise to pay the balance should be inferred. The payment must be such that a promise may be inferred in fact, not merely implied in law.

BOYD, J., concurred.

Solicitors for the plaintiffs: *Johns, Bates, & Johns.*
Solicitor for the defendant: *J. G. Scott.*

R. ST. J. C.

(1) [1898] 2 I. R. 761.
(2) 3 I. W. L. R. 97.
(3) 7 Exch. 22.
(4) L. R. 7 Q. B. 493.

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QUINN *v.* BURKE (1).

June 27, 28. *Licensing law—Licensing (Ireland) Act*, 1902 (2 *Edw.* 7, *c.* 18), *sect.* 2, *sub-sect.* 2—*Hotel—Right of sale to the public—"Public bar."*

The authority to sell intoxicating liquors conferred by a license, under sect. 2, sub-sect. 2, of the Licensing Act, 1902, is not the same as that which belonged, before the Act, to an hotel license issued under the provisions of the Inland Revenue Act, 1880. Unless the house has, and continues to have, no "public bar," and answers, and continues to answer, the other descriptions of an hotel contained in the section, the license is no protection to the holder during its currency.

With respect to such a license, where the house answers the description specified, there is no prohibition against sales to the general public—that is to say, to persons who are neither travellers nor lodgers in the house.

The meaning of the expression "public bar" considered.

THIS was a case stated by Mr. Mahony, Divisional Magistrate for the city of Dublin, for the opinion of the Court upon certain questions arising on the Licensing Act, 1902 (2 Edw. 7, c. 18), s. 2, sub-s. 2.

The case set forth that the defendant was charged in three summonses with having on the 19th February, 1st April, and 9th April, 1905, at 38 and 39 Parkgate-street, sold by retail, at a public bar in the premises, in contravention of terms of her license, intoxicating liquor, without being duly licensed to sell the same by retail. At the hearing of each of these complaints it was proved on the part of the complainant that the defendant was the holder of a license granted for an hotel, pursuant to the 2 Edw. 7, c. 18, s. 2, sub-s. 2, and that the defendant's trade was principally carried on in three rooms (marked "A," "B," and "C," on the accompanying plan), one of these rooms fronting Parkgate-street, and another being at the rear of the premises. Between these two rooms there was a third room (marked "C" on the map), part of which was cut off by a partition and glass-screen

(1) Before PALLES, C.B., and MADDEN and KENNY, JJ.

behind which intoxicating liquors were stored, and from which such liquors were handed out to an attendant to be given to the customer. This glass-screen was provided with a movable panel and door which could be opened when drink was to be handed out. The three rooms contained chairs, tables, and lounges. Upstairs there were a sufficient number of bedrooms to comply with the provisions of the Act. No customer had been served directly at the enclosure in room "C," all drinks being given to an attendant who handed them to the customers. On each of the occasions referred to in the summonses several persons residing in the city of Dublin, some of them in the immediate neighbourhood of the defendant's shop, were found drinking intoxicating liquors in these rooms. These persons were not travellers or lodgers in the defendant's hotel; and the intoxicating liquors had been sold to them by the defendant.

No witness was called for the defence, but defendant's counsel put in, and relied upon, the license issued to the defendant by the Inland Revenue Authorities, and also a certificate that she had paid the sum of 10*s.* as required by the 3 & 4 Wm. 4, c. 68, s. 12.

The defendant admitted that all persons coming in and asking for drink were supplied.

Counsel for the complainant contended that the defendant had on her premises a public bar within the meaning of 2 Edw. 7, c. 18, s. 2, sub-s. 2, and that the license issued under the authority of that section did not authorise the sale of drink to persons not being travellers or lodgers in the hotel. For the defendant, it was contended that the summonses disclosed no offence, that there was no evidence to support the offence as charged in the summonses, and that the words "public bar" referred to a physical structure analogous to a publichouse counter, at which persons stand and take drink, and that no such structure existed on the defendant's premises. It was further contended on behalf of the defendant that the license issued to her was not a new kind of license, and was in fact the license known as a publican's license, and carried the same rights at least as an hotel license issued under the Inland Revenue Act, 1880, sect. 43.

The magistrate was of opinion that the license was in fact a new kind of license, and he held that it was not legal for

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T. M. Healy, K.C., and *James O'Connor*, for the defendant.

D. S. Henry, K.C., and *Cecil Atkinson*, for the complainant.

The cases referred to were *Stephens* v. *Empson* (1) and *Quin* v. *Murray* (2).

Cur. adv. vult.

June 28. PALLES, C.B.:—

Mr. Mahony appears to have based his decision upon the following passage contained in my judgment in *The King* v. *Justices of Dublin* (3), in reference to these premises: —

> "The effect of that Act (2 Edw. 7, c. 18) is that the learned Recorder can now legally grant an hotel license, the legal effect of which will be that, and no more than that, which the old publican's license would have had, had it been capable in law of being controlled by an undertaking such as we have here. Therefore, a license can now be granted by the sole operation of which Mr. Burke would be legally bound *to limit his trade in the manner contemplated by the undertaking.*"

The undertaking referred to in this passage is stated at p. 430 of the report. It is:—

> "That *the bar* to be opened in pursuance of the license, if granted, shall be made use of for hotel purposes only, and be a supply bar, merely for the accommodation of guests at applicant's restaurant, or persons stopping at his hotel, and not in any sense a public drinking bar."

The undertaking referred to the bar only; and the 2 Edw. 7, c. 18, by authorising a license for an hotel "having no public bar

(1) 1 Ex. D. 100. (2) 8 Ir. Jur. (N.S.) 392. (3) [1903] 2 I. R. 429, at p. 439.

for the sale of intoxicating liquors," has even a greater effect than would have had the undertaking I referred to, had it been legal. The one—the Act—prevents the existence of the bar; the other —the undertaking—had it been legal, would only have restricted its use.

It, however, by no means follows from what I said, nor did I intend to suggest, that the effect of the Act was that in an hotel having a license under that Act, intoxicating drink could not be sold to the public, if the sale were not at, or in, a public bar.

The legal effect of the certificate of the Clerk of the Peace, which was given in pursuance of the order of the Recorder, was that the appellant here was entitled to receive a license for the sale of intoxicating liquors in an "hotel," viz., in a house . . . answering a particular description and, *inter alia*, having no public bar for such sale; and were it necessary that this should appear on the face of the certificate, I conceive that it does so appear, from the words used, and the reference to the statute of 2 Edw. 7. Were the license not to be so construed, it would be absolutely void: *The King* v. *Greer* (1). I think it clear that the sale at, or in, a public bar in an hotel cannot be protected by such a license.

As to what is a "public bar," within the meaning of the Act, I adopt the definition in Mr. Murray's Dictionary—"A barrier or counter, from which drink (or food) is served out to customers in an inn, hotel, or tavern; and hence in a coffee-house, at a railway station, etc.; also the space behind the barrier, *and sometimes the whole apartment containing* it." To what extent the enclosing of the counter with glass, containing a sliding glass door, and the existence of partitions, which divide into several rooms communicating with each other that which, but for such partitions, would have been the single apartment in which the counter is, prevents the counter and rooms answering the description of a "public bar" within the statute must usually be, and in this case is, a matter of degree, which affects only the question of fact. In the present case there is a door, part of which is glass, and which is capable of being kept open between the counter and each of the rooms in

(1) [1904] 2 I. R. 494.

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question, and there are also doors between the room in which the counter is, and each of the rooms adjoining. In my opinion, there is evidence that the counter and these three rooms constitute a "public bar"; and as there is evidence of sales of drink in that bar, were there nothing else in the case, I should have thought that the conviction was right.

There is, however, much more in the case, and much that requires serious consideration. In determining the question of fact, whether these rooms and counter constitute a "public bar," within the meaning of the Act, the learned magistrate was of course bound to ascertain, in the first instance, what was the meaning of the expression "public bar," as used therein. This he, most properly, proceeded to do from a consideration of the entire Act; and he seems to have been of opinion—and in this I agree with him—that as ancillary to determining whether these rooms constituted a "public bar," it was material that he should inquire and decide whether the effect of the Act was to prohibit *any* sale, in an hotel with such a license, of drink to persons, who were not travellers or guests in the hotel; and he arrived at the conclusion that it was. Were he right in this, a sale to anyone, not a traveller or a guest, would have been unauthorised.

Whether he was right in this is one of the questions here. The only words which can be construed to create a prohibition are two: first, the word "hotel"; secondly, the words "having no public bar." As to the use of the word "hotel," I have to observe that at the time of the passing of the Act, the license of an hotel was the ordinary publican's license, and the duty payable in respect thereof, if the annual value exceeded £50, varied, according to the structure of the hotel and other circumstances. The 43 & 44 Vict. c. 20, section 43, sub-section 4, enacts:—

> "Where, in the case of premises of the value of £50 or upwards, it shall be proved to the satisfaction of the Commissioners, that the premises are structurally adapted for use as an inn or hotel for the reception of guests and travellers desirous of dwelling therein, and are mainly so used, the amount of duty to be paid on a license to retail spirits shall not exceed £20."

But is the use of the license, contemplated by that, one limited to the guests in the hotel, excluding the public generally? I am of opinion it is not; because a proviso is added, in the following terms:—

> "Provided, that the relief under this sub-section shall not be given, in case any portion of the premises is set apart and used as an ordinary publichouse for the sale and consumption therein of liquors, and the annual value of such portion, in the opinion of the Commissioners, exceeds £25."

So that, under no circumstances, although the premises were "an hotel for the reception of guests and travellers," and as such entitled to be licensed under this sub-section at the reduced scale of duty, is there any absolute prohibition of sales therein to the general public; but, in the particular event of a licensed person wishing to take advantage of the provisions of this 4th sub-section, he must restrict the use of the house as an ordinary publichouse to a portion of it not exceeding £25 in value. That, in my mind, shows to demonstration that the use of the word "hotel" in the Act of Parliament did not, in any way, prohibit the sale of liquor to the general public.

This brings me to the words "having no public bar." Do these words involve a prohibition against selling liquor to the general public in any part of the house? I am of opinion that they do not. *Per se*, and irrespective of other statutes, they would not be sufficient for this purpose; but the matter is made more clear by having regard to the 3rd sub-section of the section of the Act I have already referred to. But, before I read it, I should like to treat the case without reference to that sub-section.

The condition imposed is not to have a public bar. Now, there are, in licensed premises, two perfectly distinct and separate modes of accommodating the general public: first, at or in the ordinary public bar; secondly, in the coffee-room, or any other part of the hotel appropriate for that purpose, where food and drink at the same time, or either food or drink only, can be supplied. How can the prohibition against supplying the public with drink *in one particular way* justify a legal tribunal, such as we are, in taking it upon itself to say that that amounts

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to a prohibition against supplying the public in *any way*. If the Court were to so decide, its decision would work a prohibition different from, and greater than, that imposed by the Act of Parliament. The decision would work a total exclusion of the public, whilst the restriction in the Act was against that particular mode of getting drink which is involved in being supplied at or from a public bar."

I now come to the 3rd sub-section of the Act of 1880, c. 20, section 43, which I deem important, because I consider that the word "hotel," in the Act of Edward 7 has the same meaning that it had in the Act of 1880. This latter Act is the only example to which we have been referred of the use of the word "hotel" in a licensing Act.

> "Any person applying for a six days' and early closing license for the sale of spirits as an auxiliary only to his business as a restaurateur or eating-house keeper, not keeping an open drinking bar, shall be entitled to his license at a sum not exceeding £30: no such reduction to be made unless the licensing justices shall have certified by endorsement on their certificate that the nature of the business carried on by the applicant justifies the reduced scale of charge."

That is, he is to be entitled to a license; and how is he to use that license? "As an auxiliary only to his business as a restaurateur or eating-house keeper." But that is one of the very businesses which may involve the sale of liquor to any member of the public who thinks proper to visit the house.

I, therefore, look upon that 3rd sub-section as showing that, in the view of the Legislature, the prohibition against keeping an open drinking bar is consistent with the right to sell drink to the public; and whether that right is a general or restricted one can be ascertained only from the terms of the particular statute. The only restriction in this statute is that the sale is not to be at or in a public bar.

I am of opinion that in arriving at the conclusion that there should be a conviction in this case, Mr. Mahony determined that there was, upon these premises, something that answered what he thought was the legal description of "a public bar," but which need not necessarily have answered the description which, in our opinion, is the proper one of such a bar, and that, therefore, the

conviction cannot stand. The case must be remitted back to the magistrate, with a direction to determine it in accordance with the declaration of law which we shall insert in our order.

A word as to the defendant's argument, that there cannot in this case be a conviction under the 3rd section of the Licensing Act, 1872. My opinion is clear that there can be, provided the magistrate comes to the conclusion that there was a public bar upon the premises. I say this because I consider that there is a condition in the license, amounting to a prohibition against selling at or in such a bar on the premises.

As to the costs, we think that as the Crown has succeeded on one point, and the defendant on the other, there should be no costs to either party.

MADDEN, J.:—

I am of the same opinion. I am clearly of opinion that the license granted to an hotel under the Act of 1902 is an ordinary publican's license, subject to all the obligations, and with the privileges, attaching to such a license. I should have come to this conclusion on a consideration of the statute itself, quite independently of the Act of 1880, under which, for the purposes of an hotel, a license can be obtained, subject to certain restrictions, and at a lower fee. It must be remembered that the Licensing Act of 1902 is no part of the general licensing code of Ireland. It is a temporary Act, expiring on the 31st December, 1907. It was passed by the Legislature in view of the fact, which was a matter of common knowledge, that the number of licensed houses, in some parts of Ireland at all events, is largely in excess of the number required for the legitimate accommodation of the public. But for the exceptions contained in the second section, it would have put an end, during the period of five years, to the issue to any person of the ordinary publican's license. For obvious reasons, exceptions were contained in the second section, the first exception being a provision necessary in common justice to the holders of licenses. As regards the exception of hotels, it was evident that the owner of a publichouse, in the ordinary sense of the term, might represent himself as the owner of an hotel, and might be dealt with as such by the Licensing Authority, on whom the Legislature was endea-

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vouring to put a check, unless there had been a definition of "hotel" contained in the statute. Accordingly, it provides that the owner of no establishment can claim a license for an hotel unless it contains ten apartments, set apart and used for sleeping accommodation of travellers, and also unless it has no public bar for the sale of intoxicating liquors, which I interpret as meaning "used for the sale of intoxicating liquors." My Lord Chief Baron has pointed out the distinction between the structural conditions required by this section, and the subsequent user of the hotel; and this distinction is of importance with reference to the question of the possibility of instituting a prosecution during the currency of a license once granted.

Although the license is, in my opinion, an ordinary publican's license, it is, on the face of it, a license granted under the provisions of a particular Act of Parliament, and this suggests very important considerations. Supposing that the conditions specified by the Act of Parliament should cease to exist, is the license a protection to the holders?

I had some doubt during the argument whether a license, duly granted in accordance with the conditions specified in the statute, was not a protection to the holder during its currency. But, on full consideration, I concur with the view expressed by the Lord Chief Baron. I think that the license, on the face of it, imports that the licensed house is an hotel which is not only *ab initio* structurally in accordance with the Act, but continues to be used in accordance with it. If the ten apartments ceased to be used exclusively for the sleeping accommodation of travellers, or, if an innocent structure which passed muster when the license was granted were by user converted into a bar for the sale of intoxicating liquors, I am of opinion that the license would cease to be a protection to the holder.

As regards the question of fact, though I think there was evidence before the magistrate sufficient to justify him in holding that the place where the drink was sold was a public bar, still I concur with the Lord Chief Baron in holding that the determination of the magistrate is so largely affected by his conclusion of law that we ought to send the case back to him in order that he may consider the question of fact independently.

Kenny, J.:—

The Divisional Magistrate held first—That under the license issued to the defendant, pursuant to the Act of 1902, it was not legal for him to sell intoxicating liquor to persons not being travellers or lodgers in the hotel; and he then added, "I was further of opinion that the words 'public bar' in said section do not refer exclusively to a physical structure of the kind suggested by the defendant's counsel; and I hold that on defendant's premises, as constructed *and used*, a public bar did exist."

The license is an ordinary retail spirit dealer's license for the sale of intoxicating liquor for consumption either on or off the premises, with the qualification that it is one for an "hotel" within the meaning of section 2, sub-sect. 2, of the Licensing Act (Ireland), 1902. So that, but for the qualification—whatever it may be—imposed by the latter Act, the license would be an ordinary publican's license. The qualification is that the license is limited to user for an "hotel," and that expression, by the Act, is to be deemed to refer to a house containing at least ten apartments set apart and used exclusively for the sleeping accommodation of travellers, and having no public bar for the sale of intoxicating liquor. I cannot come to the conclusion that this qualification is effective for the purpose of confining the sale of liquor to mere travellers or lodgers in the hotel; and I agree that the magistrate was wrong in so interpreting the Act.

On the other question, I am of opinion there was ample evidence before the magistrate to justify him in coming to the conclusion that on the defendant's premises, as constructed and used, a public bar, in the sense of being a bar for the sale of intoxicating liquor to the public, did exist. If the premises did contain a public bar for the sale of intoxicating liquor, it is clear that there would be a contravention of the license; and if the only question raised before the magistrate and decided by him was as to the existence of such a bar, his decision on the facts of the present case could not, in my opinion, be disturbed. The evidence satisfies me that these premises are being used as an ordinary publichouse; but I cannot say how far Mr. Mahony's decision, which we hold to be erroneous, as to the persons to whom the liquor can be legally sold, has influenced him in his second conclusion; and I, therefore, do not dissent from

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the decision of my brethren that this case ought to go back to the magistrate.

The curial part of the order was as follows:—

"THE COURT is of opinion that the magistrate was not correct in holding that it was not legal for the defendant to sell intoxicating liquors to persons not being travellers or lodgers in the hotel, and, accordingly, doth reverse said decision; but, being also of opinion that there was some evidence that there was on defendant's premises a 'public bar' within the meaning of the second section of the 2 Edw. 7, c. 18, the Court doth remit the case to the said magistrate for rehearing, and to do thereon as shall be just and consistent with the declaration in this order. No costs."

Solicitor for complainant: *Sir Patrick Coll.*
Solicitor for defendant: *Roger Greene.*

J. L.

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Nov. 25.
Dec. 16.

HAMILTON *v.* COLHOUN (1).

(1903. No. 11,864.)

Costs—Taxation between party and party—Attendance of country solicitor on record as witness at trial in Dublin.

A country solicitor, being solicitor on record for one of the parties, was examined at the trial of the action in Dublin, he being a material witness and his attendance at the trial having been directed by counsel. The solicitor having claimed in his costs as between party and party his expenses of such attendance as a witness, the Taxing Master disallowed them, being of opinion that the case of *Colhoun* v. *M'Namee* (1 New Ir. Jur. R. 275) was an express decision that such claim could not be allowed:—

Held, that the case of *Colhoun* v. *M'Namee* was not a conclusive authority necessarily excluding such claim, but that the right to such expenses depends in every case on a question of fact, viz.: Was the solicitor's attendance at the trial attributable to his character as solicitor or as witness? If the former, the claim should be disallowed; if the latter, allowed.

Held, by Wright, J., that in the present case the solicitor being a material witness, his expenses should be allowed, subject to taxation.

(1) Before GIBSON and WRIGHT, JJ.

MOTION to review taxation.

The action was brought against the defendant, one of the executors of Ezekiel Stewart, deceased, by the plaintiff, who was the other acting executor of the same deceased, to recover the sum of £102 10*s.*, money alleged to have been paid by the plaintiff for the use of the deceased as surety upon a guarantee. The statement of defence, in addition to formal traverses, contained a plea of *plene administravit.*

It appeared that Ezekiel Stewart, shortly before his death, being in financial difficulties, had executed a deed of assignment of all his property to trustees for the benefit of his creditors. The plaintiff and the defendant were two of these trustees. The defendant's counsel in his direction of proofs directed that the defendant's solicitor, Mr. Edward Clark, would require to be examined at the trial to prove the active part taken by the plaintiff as trustee of the deed.

The action was tried in Dublin before Wright, J., and resulted in judgment being given for the defendant with costs.

On the taxation of the costs as between party and party, a question arose as to the allowance of one of the items (No. 94) claimed by the defendant's solicitor, viz. a sum of £21 1*s.* 6*d.*, being £18 18*s.* for six days' attendance in Dublin from the country as a witness at the trial of the action, and £2 3*s.* 6*d.* for travelling expenses. An affidavit made by the defendant's solicitor dealing with this item contained the following statements: "In pursuance of counsel's directions, I attended in Dublin as a necessary witness on the trial of this action, and I was examined on behalf of the defendant. I was a witness to the execution of the trust deed, and also to the execution by plaintiff, as one of the trustees of the said trust deed, of an assignment of leasehold premises comprised in the said trust deed to a purchaser of the said premises. I was examined as to both these documents; and as I had acted for the trustees in realizing the trust estate, I was examined as to the active part taken by plaintiff as a trustee, and also as to his having acted as executor of the said Ezekiel Stewart. I also gave evidence of having, as solicitor for the trustees, served, prior to the death of the said Ezekiel Stewart, notice of assignment by the trust deed of the debts due to the said Ezekiel Stewart, on

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all his debtors, and a demand of payment on behalf of the trustees. I had no other business in Dublin at the time of the trial of this action, and I attended for the purpose of giving evidence thereon. Only for the fact that I was directed to attend as a witness, there was no necessity for my attendance in Dublin, as my town agent, Mr. G. Munro Meares, could have properly and efficiently attended to the case."

The Taxing Master disallowed this claim, but allowed certain other items claimed as attendance fees as solicitor, in accordance with items 189 and 191 in the Schedule of Costs and Fees, Appendix S. to the Rules of the Supreme Court (Ireland), 1891. He overruled an objection to such disallowance, giving the following grounds for his decision:—"On the hearing of the objections, the affidavit of the solicitor for the defendant, sworn the 5th of August, 1904, was read, and the following cases were cited: *Colhoun* v. *M'Namee* (1); *Barry* v. *Spaight* (2); *Craig* v. *Boyd* (3); *The Soto* (4). *Craig* v. *Boyd* (3) was a probate matter; but there is no doubt, I think, that, if it is applicable to actions at law generally, it would be an authority to sustain this objection. The earlier case of *Colhoun* v. *M'Namee* (1), however, was not cited in *Craig* v. *Boyd* (3). I entertain a strong opinion, perhaps an erroneous one, that *Colhoun* v. *M'Namee* (1) is an express decision in an action at law against the allowance of the claim here made, and, accordingly, subject to the correction of the Court, I overrule the objection. The fact that the trial in *Colhoun* v. *M'Namee* (1) was held at the Assizes and not in Dublin, does not, I think, affect the question. Indeed, I apprehend that the trial being in Dublin strengthens the disallowance of the item, because I believe there exists a legal fiction that solicitors are, or should be, always in attendance in Dublin."

Leech (with him *Matheson*, *K.C.*), for the defendant:—

Colhoun v. *M'Namee* (1), upon which the Taxing Master based his opinion, is distinguishable. There the action was tried at the Assizes at Londonderry, and it was the duty of the plaintiff's

(1) 1 New Ir. Jur. R. 275.
(2) [1903] 2 I. R. 478.
(3) [1901] 2 I. R. 645.
(4) [1893] P. 73.

solicitor to be present there. The case of a trial in Dublin is different, since in such case the solicitor can be represented by his town agent, and need not himself necessarily be present, unless required as a witness. *Craig* v. *Boyd* (1) is a distinct authority in favour of our contention. In *Barry* v. *Spaight* (2) the claim was disallowed on the ground that the solicitor did not come to Dublin as a witness, but in his capacity of solicitor only. [He also referred to *Madison* v. *Bacon* (3); *In re Storer* (4); *In re Cramsie and Greer* (5); *Bell* v. *Atkin* (6); *Heffernan and Keeffe* v. *Vaughan* (7).]

There is no such legal fiction as that a solicitor is supposed to be always in Dublin. At all events, if there is such a fiction, it must be confined to his being there in his capacity as a solicitor, and not as a witness. We are willing here to abandon the claim for attendance as solicitor.

[GIBSON, J., referred to *Guardians of New Ross Union* v. *Colfer* (8).]

P. Law Smith, for the plaintiff:—

The present case is covered by *Colhoun* v. *M'Namee* (9). That case was not cited in *Craig* v. *Boyd* (1). The affidavit of the defendant's solicitor is very vague. He does not swear he would not have attended but for the direction of counsel. *Guardians of New Ross Union* v. *Colfer* (8) was a case of attendance—not at a trial, but on the hearing of a case stated. [He also referred to *M'Iver and Company, Limited*, v. *Tate Steamers, Limited* (10); *In re Dixon* (11).]

Matheson, K.C., in reply.

Cur. adv. vult.

(1) [1901] 2 I. R. 645.
(2) [1903] 2 I. R. 478.
(3) 5 Bing. N. C. 246.
(4) 26 Ch. D. 189.
(5) [1894] 1 I. R. 135.
(6) L. R. 3 C. P. 320.
(7) 18 I. L. T. R. 38.
(8) [1894] 2 I. R. 118.
(9) 1 New Ir. Jur. R. 275.
(10) [1902] 2 K. B. 184.
(11) [1898] 2 Ch. 443.

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Dec. 16.

GIBSON, J.:—

The question in this case is whether a country solicitor who was intimately connected with the transactions on which the claim and defence turned, who was a material witness, whose attendance was directed by counsel in advising proofs, and whose bill of costs claims expenses and fees as witness, as well as for attendance at the trial as solicitor, is entitled, the trial having taken place in Dublin, to be paid as witness. His counsel treated the claim for solicitor's fees proper as alternative, and offered to abandon same if the claim as witness was allowed. The very experienced and capable Taxing Master, without exercising any discretion, disallowed all the witness item No. 94, considering that he was bound so to do by the decision in *Colhoun* v. *M'Namee* (1), where a full Divisional Court, presided over by the Lord Chief Baron, had excluded the claim of defendant's solicitor who, residing at Omagh, was examined as a witness for his client at Derry Assizes, and who also had been directed by counsel to be examined.

The authorities are not quite satisfactory; and before considering them, I shall deal with the question on principle.

A solicitor is not bound to be in Dublin, but he is supposed to be represented there by a competent agent. Hence, the attendance fees for a Dublin are lower than those for a country case. There is no fiction that a solicitor resides in Dublin, and must be taken to be constructively present at a trial there. Though, under special circumstances, in solicitor and client costs, he may be allowed for coming specially to Dublin, he is supposed to attend a trial where the nature of the case and his duty to his client make his presence necessary and proper. Whether extra remuneration can be claimed against his own client or not, he cannot exceed in party and party costs the allowances in the scale. This scale relates to professional remuneration only, and has no connexion with any claim by the solicitor as witness—a different character.

A solicitor's claim in the capacity of witness at a trial is, therefore, not necessarily excluded by his being solicitor on record for either of the parties. The plaintiff might subpœna defendant's solicitor, or *vice versa*, and if the solicitor's attendance as witness

(1) 1 New Ir. Jur. R. 275.

was caused by such subpœna, it would be obvious that he must be paid as witness. The attendance of a client's own solicitor would fall within the same principle, though the question of the actual cause of the solicitor's personal attendance might be more difficult to ascertain.

Though the position of being solicitor on record should not preclude the solicitor from claiming as witness when examined for his client, it does not follow that in every case where he is a material and necessary witness, his attendance must be allowed for in that character. I think the allowance should depend on a question of fact to be determined by the Taxing Master:—What was the real cause of the personal attendance at the trial? There are many cases where the solicitor would be guilty of dereliction of duty to his client if he did not attend the trial, apart altogether from his character as witness. For example, in a heavy probate suit where the main issue was undue influence, and the solicitor happened to be attesting witness to a will the due execution of which was not in real controversy, if the Taxing Master was satisfied that the solicitor ought to and would have been present in the performance of his duty to his client, the officer should confine the solicitor to his attendance fees as solicitor. And where fees as a witness are allowed, it should be seen that such fees are not increased from the character of witness being unduly prolonged, by deferring the period of examination or otherwise.

On principle, therefore, it would seem that whether a solicitor on record in a Dublin case should be allowed to charge as witness, depends on whether his attendance was attributable to his position and duty as solicitor, or to his capacity of witness. This is a question of fact which in most cases would be easy of solution.

I now say a word as to the authorities. *Colhoun* v. *M'Namee* (1) was in reference to a trial at Derry, and no reasons are reported for the decision. The solicitor, who resided at Omagh, in his bill apparently claimed for fees as solicitor as well as witness. He was allowed five guineas for professional attendance, but the charge of eighteen guineas claimed as witness was struck out. The items there claimed formed only a small part of those under review.

(1) 1 New Ir. Jur. R. 275.

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The same remark applies to *Craig's Case* (1), where my brother Andrews overruled the objections to items for the attendance and travelling expenses of defendant's solicitor, who was a necessary witness. The previous case was not cited, and the decision, which does not purport to lay down any general principle, may have proceeded on the facts. The next case was *Barry* v. *Spaight* (2), where the solicitor's fees as witness were disallowed, as his presence at the trial was plainly due to his duty as solicitor, and it was only by accident that he came to be called as a witness at all.

None of these cases appears to decide the present. *Colhoun* v. *M'Namee* (3), as reported, does not lay down any general principle. All the decisions may have proceeded on the view of the facts taken by the Court. This was certainly so in *Barry* v. *Spaight* (2).

During the argument I called attention to *Colfer's Case* (4). It relates only to solicitor and client costs, but it is important as negativing the supposed fiction of every solicitor having a constructive permanent residence in Dublin. No such fiction exists. The case, however, of *Belfast Harbour Commissioners* v. *Lawther* (5), therein cited, conveys (see p. 150) that in the opinion of Walsh, M.R., a Judge with wide common law as well as equity experience, it would be a wholesome rule never to allow an additional charge for attending at the hearing or trial of an action, as every solicitor should contemplate that his presence may be requisite. Personal attendance at a trial is not necessary in every case; but where the litigation is such that the solicitor ought to be present, it would or might be reasonable to attribute his attendance to his professional duty.

I think there is nothing in the authorities to prevent me from acting on my own view. I, therefore, reject the contention of Mr. Clark's counsel that wherever the solicitor on record is a necessary witness, and is included as such in counsel's direction of proofs, he *must* be allowed fees, &c., as witness. I also reject defendant's argument that under no circumstances can such solicitor be permitted to charge as such witness. The right to claim as witness depends on the Taxing Master's decision on the

(1) [1901] 2 I. R. 645.
(2) [1904] 2 I. R. 478.
(3) 1 New Ir. Jur. R. 275.
(4) [1894] 2 I. R. 118.
(5) 17 Ir. Ch. R. 147.

question of fact—if there is evidence to support it—was the solicitor's presence attributable to his professional duty, or to his character of witness? The Taxing Master must consider all the circumstances of the case—the necessity of the evidence (a matter here admitted), counsel's direction (if any), the nature of the litigation, the conduct of the solicitor in attending consultations, &c., and whether the case was one in which a solicitor with due sense of his duty to his client ought to have attended the trial in person.

In the present case the solicitor was certainly a material witness, and was expressly directed by counsel to attend as such. On the other hand, his affidavit is rather vague, and from his personal connexion with the various transactions it might be inferred that in any case he should and would have been in attendance at the trial. I desire to abstain from saying anything that would fetter or embarrass the Taxing Master in dealing with the facts, and in applying the above principle. As his rejection of Mr. Clark's claim was founded entirely on the supposed conclusive effect of *Colhoun* v. *M'Namee* (1), the case must be referred back to the Taxing Master to decide whether Mr. Clark was at the trial by reason of his duty as solicitor or as witness.

WRIGHT, J. :—

With the greater part of the judgment which has been delivered by my brother Gibson, I entirely concur; but as I have arrived at a different conclusion as to what the form of our order should be, I wish to state my conclusion, and, very shortly, my reasons for it.

The action was tried by me, without a jury, in June of the present year. I have before me the notes which I took at the trial, without which it would be impossible for me to recollect the leading facts of the case. It was an action, as I gather from my notes, by the plaintiff, Hamilton, against the defendant, Colhoun, as executor, to recover a sum of £102, money paid by him for the use of the testator. Some months before the death of the testator the latter had executed a trust deed for the benefit of creditors, prepared by Mr. Clark, the solicitor, who attended the meeting of

(1) 1 New Ir. Jur. R. 275.

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creditors, assisted in carrying through the arrangement, and distributed the deceased's property under that deed. It was proved to me that there were no assets in the hands of the defendant, and, accordingly, amongst other findings, I found for the defendant on the plea of *plene administravit*. Not only was Mr. Clark thoroughly conversant with the matters in question in the case, but his attendance was very properly directed by counsel, and he was a material and necessary witness. He was a most material witness from his long connection with the estate and with the parties, from the year 1902.

The officer disallowed the claim for expenses, and I have before me his reasons for so doing. He says—"On the hearing of the objections the affidavit of the solicitor for the defendant, sworn the 5th of August, 1904, was read, and the following cases were cited:—*Colhoun* v. *M'Namee* (1); *Barry* v. *Spaight* (2); *Craig* v. *Boyd* (3); *The Soto* (4). *Craig* v. *Boyd* (3) was a probate matter, but there is no doubt, I think, that if it is applicable to actions at law generally, it would be an authority to sustain this objection. The earlier case of *Colhoun* v. *M'Namee* (1), however, was not cited in *Craig* v. *Boyd* (3). I entertain a strong opinion, perhaps an erroneous one, that *Colhoun* v. *M'Namee* (1) is an express decision in an action at law against the allowance of the claim here made, and, accordingly, subject to the correction of the Court, I overrule the objection. The fact that the trial in *Colhoun* v. *M'Namee* (1) was held at the Assizes, and not in Dublin, does not, I think, affect the question. Indeed, I apprehend that the trial being in Dublin strengthens the disallowance of the item, because I believe there exists a legal fiction that solicitors are, or should be, always in attendance in Dublin."

Accordingly, the officer, without exercising any discretion, without considering whether or not Mr. Clark was a material witness, forming no opinion on that question, came to the conclusion that *Colhoun* v. *M'Namee* (1) was a binding authority in the present case, and that in no case would he allow the expenses of a solicitor as a witness where he was a solicitor on the record.

(1) 1 New Ir. Jur. R. 275.
(2) [1904] 2 I. R. 478.
(3) [1901] 2 I. R. 645.
(4) [1893] P. 73.

Colhoun v. *M'Namee* (1) is somewhat unsatisfactory as reported. All that is stated is that the claim for expenses by the solicitor in that case was disallowed by the Lord Chief Baron, amongst several other items. As to *Craig* v. *Boyd* (2), it is said that *Colhoun* v. *M'Namee* (1) was not cited there. I do not know, but I gather that it was not, because it is not referred to by the learned Judge. That was a trial in Dublin of a probate case. The judgment in respect of this item is very short—"These were sums charged for the attendance and travelling expenses of the defendant's solicitor. I overrule the objections to these items; the presence of the solicitor was required as a witness, and it was for the Taxing Master to fix the amount." I cannot see that there is any distinction in principle between a probate action tried in the Probate Court, and a common law action tried in the King's Bench Division.

The other case that was cited before us was *Barry* v. *Spaight* (3), which came before a Divisional Court consisting of Mr. Justice Kenny, Mr. Justice Barton, and myself. It appears there that the claim was for the expenses of Mr. Gaffney, the solicitor on the record for the plaintiffs in an action brought under Lord Campbell's Act. It would seem from the facts that the question of putting Mr. Gaffney into the witness-box and turning him into a witness, was more a matter of chance than anything else—something done at the instance of the Lord Chief Justice—at all events the decision of the Court of which I was a member, and to which decision I adhere, is stated by Mr. Justice Kenny on this point as follows:—

"As to Mr. Gaffney, the plaintiff's solicitor, he claims in the bill of costs not only the fees properly payable to him as the solicitor on record for attending the trial in Dublin, amounting altogether to £7 19*s.* 4*d.*, but also allowances and travelling expenses as a witness, amounting to £22 1*s.* These allowances are calculated at £3 3*s.* a day for seven days. Before both the Taxing officer and this Court, Mr. Gaffney offered to reduce the £22 1*s.* by £6 19*s.* 4*d.*, part of the £7 19*s.* 4*d.*; in other words, to claim merely as a witness. Three cases were cited to us on the

(1) 1 New Ir. J. 275. (2) [1901] 2 I. R. 645. (3) [1903] 2 I. R. 473.

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question of this disallowance, viz. *Heffernan* v. *Vaughan* (1); *Colhoun* v. *M'Namee* (2); and *Craig* v. *Boyd* (3); but I do not think that any of them can assist us on a point that must depend on its own special circumstances."

I adopt these words. I think the present case must depend upon its own circumstances; and having regard to the facts existing in this case, and known to me as the Judge who tried it, I consider that I am in a position to say that the presence of the solicitor at the trial was as a witness, and a most material and necessary witness, attending under the direction of counsel. Accordingly, if I were sitting alone I would not send the case back to the Taxing officer, but would allow this claim, subject to taxation; but the Court being divided, I, as the junior Judge, withdraw my judgment, and the order of the Court will be in the terms stated by Mr. Justice Gibson.

The order of the Court was as follows:—

"THE COURT being of opinion that the case of *Colhoun* v. *M'Namee* is not a conclusive authority excluding the solicitor necessarily from claiming as a witness, doth refer the said item, No. 94, back to the Taxing Master, to consider and determine whether the solicitor's attendance at the trial was attributable to his character of solicitor or as witness. If the former, the fees as witness should be disallowed; if the latter, they should be allowed: the solicitor electing, if allowed fees as witness, to abandon attendance fees as solicitor for the same period."

Solicitor for the plaintiff: *William P. Moody.*
Solicitor for the defendant: *Edward Clark.*

J. G. T.

(1) 18 I. L. T. R. 38. (2) 1 New Ir. Jur. R. 275. (3) [1901] 2 I. R. 645.

THE NATIONAL TELEPHONE CO. *v.* GRIFFEN (1).

K. B. Div. 1905.

Nov. 29. Dec. 4.

Contract—Rent in advance—Telephone—Disconnexion—Right to the full rent.

G. agreed to pay to the National Telephone Company rent in advance for the use of a telephone. The Company was to have the right to "disconnect" G., without prejudice to the other conditions of the contract, if he failed to observe the Company's rules, or if any sum of money payable by him under the contract was in arrear. Furthermore, the contract was terminable by the Company in the event of any sum payable under it being in arrear. G. paid the first year's rent in advance; but, upon the second falling due, he declined to pay in advance for the future. Thereupon the Company disconnected G., and claimed to be entitled to recover the full rent payable on the first day of the second year, although he had in fact enjoyed the use of the telephone during forty days of the second year, and no more:—

Held, that the Telephone Company was entitled to recover the second year's rent in full.

CASE STATED for the opinion of the Court by Kenny, J., upon the hearing of a civil-bill appeal from the Recorder of Dublin. The facts of the case are fully set out in the judgment of the Lord Chief Justice.

W. G. Jefferson, for the plaintiffs.

Rynd, for the defendant.

The following cases were cited: *The National Telephone Company* v. *Clotworthy* (2); *Same* v. *Barnett* (3); *Ellis* v. *Rowbotham* (4).

Cur. adv. vult.

LORD O'BRIEN, L.C.J.:—

Dec. 4.

The question in this case has been concluded by authority—has been ruled in plaintiffs' favour by a case in this country and a case in England, neither of which was cited to the learned

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and BOYD, JJ.

(2) 2 New Ir. Jur. 25.

(3) Unreported.

(4) [1900] 1 Q. B. 740.

K. B. Div. 1905. NATIONAL TELEPHONE Co. *v.* GRIFFEN. Lord O'Brien, L.C.J.

Recorder. The English case is a case of *The National Telephone Company* v. *Barnett* (1). It is right to say that I can find no trace of it in the books; but I have been supplied with a manuscript report, the accuracy of which I have no reason to doubt. The Irish case was *The National Telephone Company* v. *Clotworthy* (2).

The question before us arose on an appeal from a decision of the Recorder, which was heard before Mr. Justice Kenny, who reserved the matter of controversy for our determination. The facts were as follows:—The civil bill which initiated the legal proceedings was brought for recovery of the sum of £4 15*s.* alleged to be due by the defendant to the plaintiffs under an agreement in writing of the 19th December, 1903, whereby the defendant agreed to pay the plaintiffs the annual sum of £4 15*s.* in advance in connexion with the establishment on the defendant's premises of a public telephone call office. The agreement provided, *inter alia*—(*a*) That it was to be subject to the conditions set out on the back thereof; (*b*) that the term of the contract should begin to run from the day after the posting of a notice by the Company that it was prepared to complete the connexion, from which date any annual payments should begin to accrue; (*c*) that the contract was a yearly one, determinable by the defendant at the end of any year of the term by three calendar months' previous notice in writing, or by the Company by a similar notice, expiring at any time; that the defendant should pay to the plaintiffs the sum of £4 15*s.* annually, in advance, and that he should guarantee that the amount to be received by the Company in any one year of the contract in respect of local calls should not be less than £6 10*s.* By the 4th condition (upon which this question principally arises) set out on the back of the contract—"The Company reserves to itself the right to disconnect the subscriber, without notice and without prejudice to the other conditions of the contract, if the subscriber fails to observe, or commits a breach of, any of the Company's printed rules and regulations, or of any of the terms and conditions herein contained, or if any charge or sum of money payable under this contract is in arrear." By the 12th condition the contract is terminable by the Company "forthwith or at any time thereafter"

(1) Unreported. (2) 2 New Ir. Jur. 25.

in the event of any sum payable under the contract becoming in arrear, or of any breach by the subscriber of any of the terms or conditions of the contract, and thereupon the Company might at once remove the telephone apparatus without prejudice to any other remedy it might have at law. The connexion was complete on the 31st December, 1903, and notice thereof was given by the plaintiffs to the defendant. The defendant then paid the first year's rent of £4 15*s.* in advance, pursuant to the agreement. On the 31st December, 1904, another year's rent in advance accrued due. The defendant declined to pay in advance for the future; a correspondence ensued, and as the defendant persisted in refusing to pay in advance, the plaintiffs, on the 9th February, 1905, "disconnected" the defendant. The disconnexion was made on the ground that the yearly rent of £4 15*s.*, payable in advance, was then in arrear. The plaintiffs did not remove the telephone apparatus, which still remains on the defendant's premises. The telephone was in use on the premises up to the 9th February. The Recorder is stated to have been of opinion that the plaintiffs having disconnected the defendant, determined the contract as of the date of such disconnexion, and were only entitled to recover a proportion of the rent from 31st December, 1904, to the 9th February, 1905, which proportion was to be taken as rightly estimated at 10*s.* 6*d.*, for which he gave a decree.

Independently of the cases that have been cited, we are all of opinion that the rent being made payable in advance, an action of debt would lie upon the day the rent accrued due, and that the plaintiffs are entitled to recover the full sum. The disconnexion of the defendant by the plaintiffs—the 4th condition—does not modify his liability.

However, the case is concluded in the plaintiff's favour by *The National Telephone Co.* v. *Clotworthy* (1), which was a unanimous decision of the full Court, consisting of my brothers Gibson, Madden, and Boyd, and myself, and involved the very question presented for our determination here. *The National Telephone Co.* v. *Barnett* (2)—the English case—was stated by the County Court Judge of Kent for the opinion of the Queen's Bench Division in

(1) 2 New Ir. Jur. 25. (2) Unreported.

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NATIONAL TELEPHONE Co. *v.* GRIFFEN.

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England, and in that case Mr. Justice Lawrence and Mr. Justice Kennedy laid down the same principle. Where the Company acts under the 4th condition, they do not, in my opinion, rescind the contract at all. They can disconnect "without prejudice to the other conditions of the contract." That contemplates that the contract is not rescinded. The events in which their right to disconnect arises are where "the subscriber fails to observe, or commits a breach of any of, the Company's printed rules and regulations, or of any of the terms and conditions therein contained, or if any charge or sum of money payable under the contract is in arrear." This provision, intended to secure the performance of the contract, enables the plaintiffs to put pressure on the defendant to pay; but the right to keep the defendant disconnected lasts only while the rent is in arrear. If the rent is tendered, there is no longer any right to keep him disconnected. The disconnexion is, in my opinion, commensurate with the existence and continuance of the default; and when the default ceases, the disconnexion must cease. Besides the cases cited, which are clear upon the subject, there is another case much in point, the case of *Ellis* v. *Rowbotham* (1). That was a case where there was rent payable quarterly, in advance, and within the next quarter after it accrued due the landlord re-entered under a term of the agreement. It was held that that was no bar to his suing for rent that had accrued three months before in advance. This case was not cited at the bar. It is greatly to be regretted that the cases cited and mentioned in this Court were not cited to the learned Recorder. We are of opinion that the plaintiffs are entitled to recover the full sum of £4 15*s.*; but certainly there must be no costs.

GIBSON, J.:—

There is no doubt that plaintiffs, in disconnecting the subscriber, acted under the 4th condition, not the 12th. They intended to suspend the subscriber, not to determine the contract. They were entitled to sue for the rent payable in advance, and their right cannot be affected by the defendant's wrongful

(1) [1900] 1 Q. B. 740.

refusal to pay, and the consequent suspension of enjoyment. If they had obtained judgment before the suspension, there could have been no question. The point has been already expressly determined in this Court in a Case Stated in 1901, reported in 2 New Irish Jurist, and also in England. If further authority was necessary, the reasoning in *Civil Service Corporation Society* v. *G. S. Navigation Company* (1) is in the plaintiffs' favour. During the argument I referred to *Ellis* v. *Rowbotham* (2) as an authority precisely in point. There a tenant, whose rent was payable in advance, was held liable, though the plaintiff had re-entered on a breach of the terms of the tenancy. Possibly, therefore, if the plaintiffs had acted under condition 12, they would still have been entitled to recover. But this I leave for future decision.

The plaintiffs are to blame for the appeal, and the Case Stated. They had already got the express decision of the Court in their favour, and they did not bring this before either the Recorder or my brother Kenny. They should get no costs.

BOYD, J., concurred.

Solicitors for the plaintiffs: *V. B. Dillon & Co.*
Solicitor for the defendant: *R. J. Jones.*

J. L.

(1) [1903] 2 K. B. 756, at p. 764. (2) [1900] 1 Q. B. 740.

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MARTIN *v.* W. R. M'TAGGART, LIMITED, AND KINNEAR (1).

(1905. No. 13,158.)

Practice—Contributory negligence—Inevitable accident—Particulars—G. O. XIX., Rr. 6, 7.

Where, in an action for negligence, the defendants pleaded in general terms inevitable accident and contributory negligence, the Court ordered particulars.

ACTION for damages for personal injuries to the plaintiff, caused by the defendants, or their servants, negligently, improperly, and unskilfully, driving and managing a motor car in the city of Dublin.

In addition to traversing the several allegations in the statement of claim, the defendants, who pleaded separately, alleged—(*a*) that the alleged damage, if any, arose from inevitable accident; (*b*) that there was contributory negligence on the part of the plaintiff.

Plaintiff joined issue, and pleaded that if there was contributory negligence (which he denied), the defendants could, by ordinary and reasonable care and skill, have avoided causing the injuries complained of.

The defendants declined to comply with a notice served by the plaintiff requiring particulars of these defences on the grounds—first, that such particulars were immaterial; secondly, that they were sought for the purpose of obtaining evidence of the facts alleged in the defence; thirdly, that they were known to the plaintiff; and, fourthly, that they were oppressive. The plaintiff now applied to the Court for an order that the defendants should give particulars, the application being grounded on an affidavit of the plaintiff, stating that he was not aware of any circumstances

(1) Before LORD O'BRIEN, L.C.J., and GIBSON and KENNY, JJ.

which would constitute inevitable accident or contributory negligence on his part; that the particulars were absolutely necessary to enable him to know what case he would have to meet, and to limit the issues, and save expenses, and to prevent plaintiff being taken by surprise at the trial; that the particulars were not sought for to discover the defendants' proofs, but were essential, material, and relevant to the action.

W. G. Gibson, for the plaintiff, referred to the Annual Practice, 1906, vol. i., pp. 230, 232.

A. A. Dickie, for the defendants, cited *Gouraud* v. *Fitzgerald* (1); *Rattray* v. *Cork and Macroom Railway Company* (2); *Coughlan* v. *Flanagan* (3).

Gibson, in reply:—

These cases only show that the general form of pleading adopted is admissible. They assume that further information may be required in a proper case.

THE COURT made the following order:—

"That the defendants, respectively, do, within four days, furnish to the plaintiff further and better particulars of the contributory negligence alleged against the plaintiff by the said respective defendants, and of the inevitable accident alleged in the said respective defences. Costs of the motion on both sides to be costs in the cause."

Solicitor for the plaintiff: *A. Lane Joynt.*
Solicitors for the defendants: *Redington & Sainsbury.*

J. G. T.

(1) 37 W. R. 265. (2) 4 L. R. Ir. 386. (3) 14 Ir. L. T. R. 13.

K. B. Div. 1905. Nov. 23. 1906. Jan. 12.

THE ATTORNEY-GENERAL *v.* RIALL AND ANOTHER (1).

Revenue—Succession duty—Policy of life assurance—Premiums—Payment of—Marriage settlement—Predecessor—Disposition—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 13, 17—*Customs and Inland Revenue Act*, 1881 (44 *Vict.* c. 12), *s.* 38—*Customs and Inland Revenue Act*, 1889 (52 *Vict. c.* 7), *s.* 11.

In 1853 a policy of insurance for £4000 was effected on his own life by A, in contemplation of his second marriage, and, by a contemporaneous marriage settlement, C (the mother of A's first wife), who was entitled for her life to the interest upon certain securities representing £3500 late currency, and A, who was entitled to the interest on the same securities for his life from the death of C, joined in assigning their interest in these securities during the life of A to trustees, upon trust, during the life of A, to pay out of the annual proceeds thereof the premiums on the said policy of insurance, which, by the settlement, was assigned by A to the same trustees upon the trusts of the settlement. The settlement also contained a personal covenant by A with the trustees to pay the annual premiums upon the policy. The premiums were (it was assumed) paid by the trustees out of the annual proceeds of the trust securities. A died in 1876, leaving a widow and children of the second marriage, and C died in 1880, a stranger in blood to the said children.

On an information by the Attorney-General, claiming succession duty:—

Held, that C was not a "predecessor" within the meaning of sect. 2 of the Succession Duty Act, 1853, and that succession duty at the rate of £10 per cent. in respect of a moiety of the proceeds of the said policy of insurance, as upon a succession from C, was not payable under sections 2 and 13 of the same Act.

INFORMATION on the Revenue side of the King's Bench Division claiming succession duty.

By an indenture, dated the 23rd September, 1850, and made between Mathew Henry Sankey of the first part, Mary Charlotte Roper of the second part, Charlotte Roper of the third part, the Rev. John Thomas Whitestone, Samuel Garrett, Thomas Johnston, and William Sankey, of the fourth part (being a settlement made in contemplation of a marriage then intended between the said

(1) Before PALLES, C.B., and JOHNSON and GIBSON, JJ.

Mathew Henry Sankey and Mary Charlotte Roper), two several sums of £1500 and £2000, late Irish currency, to which the said Mary Charlotte Roper was then entitled in possession, and also a sum of £4000, like currency, to which the said Mary Charlotte Roper was entitled in reversion on the death of the said Charlotte Roper, and the securities representing the said several sums, were, for the considerations therein mentioned, assigned and transferred by the said Mary Charlotte Roper to the said Rev. John Thomas Whitestone, Samuel Garrett, Thomas Johnston, and William Sankey, upon trust (*inter alia*) to permit and suffer the said Charlotte Roper and her assigns to receive and take to her own use during her life the yearly interest or dividends, or other annual produce of the said sums of £2000 and £1500 in like manner as she was then entitled to receive during her life the annual produce of the said sum of £4000, and from and after the death of the said Charlotte Roper, in case the said Mathew Henry Sankey should be then living, to permit and suffer him to receive and take the yearly interest, dividends, or annual produce of the said sums of £4000, £2000, and £1500 during his life, or until he should become bankrupt or insolvent, or take or apply to take, the benefit of any Act for the relief of insolvent debtors, or make any assignment for the benefit of his creditors, as therein more particularly mentioned.

The marriage between the said Mathew Henry Sankey and Mary Charlotte Roper was duly solemnized after the execution of the said indenture.

Mary Charlotte Sankey died on the 7th October, 1851.

By indenture dated the 1st February, 1853, made between the said Mathew Henry Sankey, of the first part, Mehetabel Roe, of the second part, the said Charlotte Roper, of the third part, and Richard John Roe and John Moore Abbott, of the fourth part (being a settlement made in contemplation of a marriage then intended between the said Mathew Henry Sankey and the said Mehetabel Roe), reciting that on the treaty for the said marriage the said Charlotte Roper agreed to assign her interest in the annual proceeds, interest, or dividends of the said sums of £2000 and £1500, to the said Richard John Roe and John Moore Abbott, during the life of the said Mathew Henry Sankey, the said Charlotte Roper reserving to herself the right of again

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receiving the said dividends and interest in the event of her surviving the said Mathew Henry Sankey, the said dividends or other annual produce of the said several sums to be held upon the trusts thereinafter mentioned, and that the said Mathew Henry Sankey had also agreed to transfer and make over all his estate and interest of and in the annual interest and dividends, or annual produce of the said last-mentioned sums, and also of in and to a certain policy of assurance on his own life for the sum of £4000 in the Guardian Assurance Office of London, dated the 25th day of January, 1853, and subject to the annual premium of £85 3*s.* 4*d.* to the said Richard John Roe and John Moore Abbott upon the trusts thereinafter expressed, the said Mathew Henry Sankey, for the considerations therein mentioned, granted and assigned unto the said Richard John Roe and John Moore Abbott the said policy of assurance, with all and every sums or sum of money thereby secured, and all benefit and advantages to arise therefrom, to hold the same upon the trusts thereinafter mentioned; and the said Mathew Henry Sankey and Charlotte Roper granted, assigned, and made over unto the said Richard John Roe and John Moore Abbott all their respective interests during the life of the said Mathew Henry Sankey in and to the yearly interest or dividends or other annual produce of the said sums of £2000 and £1500, and in and to the interest, dividends, or annual proceeds of the sum of £3251 11*s.* 3*d.* Government 3¼ Stock, in which said two sums were then invested, and of the investments from time to time representing the same, to hold the same upon trust during the life of the said Mathew Henry Sankey, without prejudice to the right of the said Charlotte Roper to receive the interest, dividends, or annual produce thereof, for her own use after his death, in case she should survive him; and it was thereby declared that the said Richard John Roe and John Moore Abbott should hold the premises so assigned to them upon trust from time to time, to call for and receive payment of the said interest, dividends, or annual proceeds, and to pay thereout in the first instance the said annual premiums of £85 3*s.* 4*d.* and such other moneys, if any, as might become payable for keeping on foot the said policy on the days and at the times when same ought to be paid, and in the next place to pay and reimburse themselves all costs

and expenses attendant on, or incidental to, the execution of the said trusts, and lastly to pay over the surplus thereof unto the said Mathew Henry Sankey and his assigns; and it was thereby declared and agreed that the said policy of assurance should be held by the said Richard John Roe and John Moore Abbott, upon trust during the life of the said Mathew Henry Sankey, to pay the annual premiums thereon from time to time as same should become due, and after the death of the said Mathew Henry Sankey, so soon as the said Richard John Roe and John Moore Abbott should realise the amount of the same, and subject to the power thereon given to them of paying costs and expenses thereout, and of re-investment, to pay the yearly income, interest, dividends, or annual produce unto the said Mehetabel Roe, in case she should survive the said Mathew Henry Sankey, during her life, and after her decease upon trust for the children of the said intended marriage as therein mentioned with divers remainders over. The said indenture contained a covenant by the said Mathew Henry Sankey with the said Richard John Roe and John Moore Abbott for the payment by him of the annual sum of £85 3*s.* 4*d.*, and such other moneys (if any) as might become payable for keeping on foot the said policy on the days on which the same ought respectively to be paid, as therein more particularly mentioned.

The marriage between the said Mathew Henry Sankey and Mehetabel Roe was duly solemnized after the execution of the last-mentioned indenture, and there was issue of the said marriage.

The premiums on the said policy of assurance were (the informant alleged) duly paid by the trustees for the time being under the provisions of the said indenture, dated the 1st of February, 1853, and out of the said trust moneys up to the death of the said Mathew Henry Sankey.

The said Mathew Henry Sankey died on the 18th of February, 1876, leaving him surviving his wife, the said Mehetabel Sankey, and children of the said marriage. The said children were living at the date of the information, and were strangers in blood to the said Charlotte Roper. The said policy of assurance for the sum of £4000 became payable on the death of the said Mathew Henry Sankey.

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Charlotte Roper died on the 23rd of December, 1880.

By indenture dated the 26th of March, 1886, the defendants were appointed new trustees of the indenture of settlement of the 1st of February, 1853.

Mehetabel Sankey died on the 1st of November, 1902.

The Commissioners of Inland Revenue called upon the defendants to deliver an account of the said policy of assurance, or the proceeds or value thereof, for the purpose of assessing the succession duty payable in respect thereof, but the defendants refused to deliver such an account, or to pay any sum for succession duty in respect of the said policy of assurance, or the proceeds or value thereof.

The Attorney-General, on behalf of His Majesty, sought a declaration—(1) that upon the death of Mathew Henry Sankey, deceased, succession duty became payable under the provisions of sections 2 and 13 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), at the rate of £10 per cent. in respect of a moiety of the proceeds of the said policy of assurance for the said sum of £4000, with interest thereon. (2) That the defendants might be ordered to deliver to the Commissioners of Inland Revenue an account of the proceeds of the said policy of assurance for the purpose of ascertaining the amount of the succession duty payable in respect thereof, and might be ordered to pay to the Commissioners of Inland Revenue such sum in respect of succession duty as might be assessed by the said Commissioners, or might properly be payable, with interest thereon, at the rate of £3 per cent. per annum.

The defendants by their answer admitted the allegations in the information save as to the payment of the premiums upon the policy of assurance put in settlement by the said indenture of 1st February, 1853. They pleaded as to this that the premiums were always paid by Mathew Henry Sankey, but that the defendants had no knowledge as to the fund out of which the said premiums were so paid by him, and they denied that any of the said premiums, or any portion thereof, was paid out of the trust moneys as alleged.

The defendants further pleaded that they refused to pay succession duty at the rate of £10 per cent. upon any portion of the proceeds of the said policy of assurance, as they were not liable

thereto, inasmuch as there was no disposition of the said policy, or of the proceeds thereof, by the said Charlotte Roper, and the same was not, nor was any portion thereof, derived by any person as successor from the said Charlotte Roper as predecessor.

The Attorney-General (*The Right Hon. J. Atkinson, K.C.*), *the Solicitor-General* (*J. H. Campbell, K.C.*), and *Edmond Coll*, for the Crown :—

By sect. 2 of the Succession Duty Act, 1853, the term "predecessor" is defined as the "settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." Charlotte Roper, if not a "settlor" or "disponer," was at least a person from whom the benefit of the policy of insurance effected by Mathew Henry Sankey was derived. It is impossible to contend that those to whom the proceeds of the policy were paid derived a benefit solely from Mathew Henry Sankey; an equal benefit, if not a greater, was derived from the person who paid the premiums, or provided the funds for such payment. The value of the policy was built up by such payments. Here the payment of the premiums was not a mere voluntary payment, it was under the trusts of a settlement executed for valuable consideration.

It is immaterial whether Mathew Henry Sankey paid the premiums himself, or whether they were paid out of the annual proceeds of the trust funds. The first trust imposed upon the interest is that for the payment of the premiums. If Mathew Henry Sankey had paid the premiums himself, the whole of the interest of the trust funds would have been paid to him; if he had not paid the premiums, he would only have received the balance after deducting the amount of the premiums. In either case when the policy was realized there was an interest derived from Charlotte Roper as a predecessor under sect. 2.

If this were a case under the Finance Act, 1894, sect. 2, sub-sect. (*a*), would apply, not sub-sect. (*c*): *The Attorney-General* v. *Robinson* (1).

The case of *The Lord Advocate* v. *Fleming* (2) shows the importance of ascertaining whose was the hand that paid the

(1) [1901] 2 I. R. 67. (2) [1897] A. C. 145.

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premiums. [They referred to *Attorney-General* v. *Dobree* (1); *Attorney-General* v. *Murray* (2); and *Attorney-General* v. *Lethbridge* (3)]. *Ramsay's Settlement* (4) and *The Attorney-General* v. *Rathdonnell* (5) will be relied on by the defendants; but these cases have no application where the property in question is not a specific sum of money, but a policy of insurance which requires to be kept on foot by periodic payments. A policy is a contract, and here the contract, though originally effected by Mathew Henry Sankey, was carried out by Charlotte Roper. Section 13 of the Succession Duty Act, 1853, therefore applies, and no agreement having been made, the successors must be deemed to have derived their succession from each predecessor in equal proportions. The children of Mathew Henry Sankey, being strangers in blood to Charlotte Roper, it follows that £10 per cent. succession duty is payable in respect of a moiety of the proceeds of the policy.

Matheson, K.C., and *Gerald FitzGibbon*, for the defendants:—

The claim on behalf of the Crown cannot be sustained. Estate duty has been paid by the defendants on the capital value of the policy of assurance, passing on the death of Mathew Henry Sankey, and the Crown cannot now in addition claim payment of succession duty: section 1 of 57 & 58 Vict. c. 30 and first schedule thereto. There was no disposition of the policy of assurance or the proceeds thereof by Charlotte Roper within the meaning of sect. 2 of the Succession Duty Act, 1853, and she was not a predecessor: *The Attorney-General* v. *Rathdonnell* (5); *Ramsay's Settlement* (4). The policy of assurance was not her property, but that of Mathew Henry Sankey, and it was put into settlement by him alone. Sect. 13 can only apply if Charlotte Roper was a predecessor. *The Lord Advocate* v. *Fleming* (6) is in favour of the defendants' contention: see judgment of Lord Halsbury, at p. 152.

The Solicitor-General, in reply.

(1) [1900] 1 Q. B. 442.
(2) [1904] 1 K. B. 165.
(3) [1905] 2 K. B. 323.
(4) 30 Beav. 75.
(5) 32 L. R. Ir. 574.
(6) [1897] A. C. 145.

Palles, C.B. :—

The claim in this information is for succession duty, alleged to have accrued due upon the death of Mathew Henry Sankey, which occurred long prior to the passing of the Finance Act, 1894.

The question is—Who was the "predecessor" within the meaning of sect. 2 of the Succession Duty Act, from whom was derived a policy of assurance for £4000, effected upon the life of the deceased?

This policy was effected by Mathew James Sankey himself in contemplation of his second marriage, and by a contemporaneous settlement, Charlotte Roper (the mother of Mr. Sankey's first wife), who was entitled for her life to the interest upon certain securities representing £3500 late currency, and Mathew Henry Sankey, who was entitled to the interest on the same securities for his life from the death of Charlotte Roper, joined in assigning their interests in these securities, during the life of Mathew Henry Sankey, to trustees upon trust, during his life, to pay out of the annual proceeds thereof the annual premiums on the policy which, by the same settlement, was assigned by Mathew Henry Sankey to the same trustees upon the trusts of the settlement. The settlement also contained a personal covenant by Mathew Henry Sankey with the trustees to pay the annual premiums upon, and otherwise to keep up, the policy.

The contention for the Crown has been that the policy moneys were derived from both Mathew Henry Sankey and Charlotte Roper as predecessors, and (there not having been any agreement under section 13 of the Act) that the succession is to be deemed to have been derived in equal proportions from each of them, and consequently, that the rate of duty at which succession duty is chargeable on one moiety of the policy moneys is 10 per cent. per annum as upon a succession from Charlotte Roper, who was a stranger in blood to those who became entitled under the settlement on Mathew Henry Sankey's death.

Now, Charlotte Roper never had any interest in the policy. It was effected not by her, but by Mathew Henry Sankey; there was no devolution of it, and the disposition of it necessary to bring it within section 2 was its assignment by Mathew H. Sankey

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alone upon trusts under which she took no interest. She was not, therefore, according to the ordinary meaning of words the "settlor," "disponer," . . . or other person from whom "the interest" in the policy was derived, and is therefore *prima facie* at least not within the definition of "predecessor" in section 2. No assistance on the question can be derived from section 13, because it is essential to its application that Charlotte Roper should be a predecessor. Until we shall have determined that question section 13 cannot apply.

The sole argument for the Crown has been that as Charlotte Roper was one of the persons who by the settlement provided the fund out of which the premiums were agreed to be paid (and were, as I assume, in fact paid) she must have been a joint predecessor with Mathew Henry Sankey, and for this *The Lord Advocate* v. *Fleming* (1) was relied on.

It was there decided that where a lady became beneficially entitled to policy moneys by the joint effect of a voluntary assignment to her by her father of a policy (on which he had for many years paid the premiums) and of the payment by herself of the premiums which accrued due after the assignment, her father, the assignor, was not a "predecessor" within the meaning of the Act. But I cannot see how that decision assists the Crown. Even had the decision there been that the father and daughter were joint predecessors, it would not apply to the present case, which lacks the essential element that the policy moneys were derived through an assignment from the person sought to be held to be predecessor. The decision, however, as it stands, so far from being an authority for the Crown, is rather the other way. The absence from sect. 2 of the words "either partly or wholly," can be and has been relied on here as it was there. The introduction of those words, the Lord Chancellor observes there, would render it true in a certain sense that the respondent there "did partly become entitled by reason of premiums previously paid, the policy effected, *and the assignment then made*, supposing she continued to pay the premiums"; but their introduction here would not have that effect—as there there was an assignment from the suggested predecessor;

(1) [1897] A. C. 145.

here there is none. I, however, treat that case as not having any bearing here. It really turned on the payment of the later premiums being by the assignee—a circumstance absent here. It is neither an authority for or against the Crown.

In truth, however, the question has, subject to one question, been long since settled against the Crown's contention by *Ramsay's Settlement* (1), and *The Attorney-General* v. *Rathdonnell* (2), by the second of which cases we are, undoubtedly, bound.

In *Ramsay's Settlement* (1) the question arose upon the settlement on the second marriage of a lady whereby the second husband settled his property upon the lady's children by a former husband. It was there held that the second husband, and not the wife, was the "predecessor" within the meaning of the Act.

The pith of Lord Romilly's judgment is in these words:—

> "I think the real question is this—If, on the marriage of the owner of an estate with a lady, he contracts to settle a sum on her relations, whether she or he is, under the words of this Act, to be considered as the predecessor from whom the interest of the successor is derived. It is clear that where a contract is made for valuable consideration, by which property is settled, the property does not belong to the person who *induced* the other to settle it, but the property remains in the person who settles it, subject to the trusts of the settlement, and, accordingly, the statute uses the word *settlor* as being one of the meanings of the word *predecessor*."

The late Court of Exchequer, in *The Attorney-General* v. *Rathdonnell* (2), followed this decision. There it was held that the wife, and not the husband, was to be deemed the predecessor from whom were to be deemed to be derived certain moneys brought into settlement by the wife, and which under the trusts of settlement became the property of the persons entitled in remainder to the husband's estates. The *ratio decidendi* is there put thus:—

> "If property be purchased from B by A, and by the same or a subsequent instrument is settled by A, A would be the predecessor. Such were the cases of *Re Jenkinson* (24 Beav. 64) and *The Attorney-General* v. *Baker* (4 H. & N. 19). But if, on the other hand, A pays to B a sum of money to induce B to settle his estate on another, then B,

(1) 30 Beav. 75. (2) 32 L. R. Ir. 574.

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and not A, would be the predecessor. John M'Clintock the elder joined in the settlement here, not in consideration of Miss Lefroy giving *him* her property, so that *he* might settle it, but in consideration, *inter alia*, of *her* settlement of her own property. The contract of the one was part of the consideration for the contract of the other, but the *act of settlement* was that of Miss Lefroy, and the fund would have remained her property to any extent to which it might in result prove to have been undisposed of by the trusts of the settlement."

The only question remaining is as to the application of that decision to a case like the present, where the subject-matter of the alleged succession is not a gross sum of money, as it was there, but is a policy of assurance. The Attorney-General insisted that whilst, of course, we were bound by that decision, it did not apply to such a peculiar property as a policy of assurance, to keep alive which it is necessary that successive acts should be done yearly or half-yearly.

We have considered that question, and arrived at a clear conclusion that the reasoning in *The Attorney-General* v. *Rathdonnell* (1) and in *Ramsay's Settlement* (2) does apply to the case of a policy of assurance. The decision in *The Attorney-General* v. *Rathdonnell* (1) is pointedly put upon this, that the act of settlement, the act of disposition, was that of the intended wife, the person whom we held was the predecessor.

If the Succession Duty Act be examined, it will be found that in its 17th section it specifically contemplates a policy of assurance as the subject-matter of a succession. That section enacts that any *disposition* or *devolution* of the moneys payable under such policy, bond, or contract, if otherwise such as in itself to create a succession within the provisions of this Act, shall be deemed to confer a succession. So that where the property is a policy of assurance, the leading idea of the Act, that the property is to be traced through a disposition or devolution, is in words applied, and the "predecessor" is to be found, in a case like this, in which there is no devolution, by finding the *disposition* through which the title at the death is derived. Upon that ground alone I should be prepared to hold that the *ratio decidendi* in *Rathdonnell's Case* (1) applies here.

(1) 32 L. R. Ir. 574. (2) 30 Beav. 75.

But there is a stronger argument which leads the same way—an argument arising under the Acts of 1881 and 1889, in relation to account duty.

Of course account duty is not payable in the present case, in consequence of the date of the death of Mr. Sankey. But dealing as we are only with succession duty, the rate of which depends on the disposition of a policy, it is not immaterial to see the view which the Legislature took of the relation between the grantee of it and another by whom it was kept up as here for the benefit of the grantee.

By section 38 of the Customs and Inland Revenue Act of 1881, one description of property which is directed to be liable to account duty is thus described:—

> "Any property *passing* under any past or future voluntary settlement made by any person dying on or after such day, by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the *settlor*, or whereby the *settlor* may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property."

This word *passing* is at least equivalent to and co-extensive with disposition. Now, the mere fact that a person was bound by contract to keep up, and did keep up, a policy of assurance for the benefit of another, was not sufficient to make the former a *settlor*, within the meaning of this clause.

I say this, because additional legislation was necessary for that purpose, and accordingly that clause was amended by the Customs and Inland Revenue Act of 1889, section 11 of which contains the following enactment:—

> "The charge under the said section shall extend to money received under a policy of assurance effected by any person dying on or after the 1st day of June, 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit."

That second sentence contains the first provision in any of these

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death duty Acts which renders a policy subject to death duty, by reason not of its disposition or devolution, but of its being kept up for the benefit of another, and that enactment is demonstration to show that the very thing relied upon here by the Attorney-General as showing that the policy here has been settled, disponed, or otherwise disposed of, was a thing that the Legislature itself had said was not sufficient to amount to a passing of property under section 38 of the Act of 1881, and, consequently it amounts to a *disposition* of it within the Succession Duty Act.

I am clear, for these two reasons, that the principle of the judgment in *The Attorney-General* v. *Rathdonnell* (1) does apply to the present case.

Applying this principle to the settlement here of 1st February, 1853, Charlotte Roper did not settle her life interest in the investments representing the £3500 upon Mrs. Mehetabel Sankey, and the children of the marriage; but she dedicated it in aid of Mathew Henry Sankey to the payment of premiums upon a policy which was *his* property, and was settled by *him*. It may be that she thereby *induced* him to make the settlement, but the settlement which he was thereby induced to make was one by which *he* alone, and not Charlotte Roper, disposed of the policy. Consequently he was the sole predecessor.

Mr. Furlong has referred us to a note of a case decided in England under the Succession Duty Act, in which the judgment appears to me, as far as I can understand it, to be contrary not only to our present decision, but also to *The Attorney-General* v. *Rathdonnell* (1).

I am not aware of the ground of that decision. It may possibly have been based upon the frame of the settlement there in question. Because if, in the case of *The Attorney-General* v. *Rathdonnell* (1), the ultimate limitation of the money had been not to the persons entitled in remainder to the husband's estate, but to the husband himself, so as to become his personal property, then, although he had by the same instrument settled it upon the trusts of the settlement according to the principle there laid down, our decision would have been the other way.

(1) 32 L. R. Ir. 574.

Therefore, I cannot understand the effect of that decision without having the settlement before me. It would be useless, however, to allow the case to stand for its production, because we are bound by the decision in *The Attorney-General* v. *Rathdonnell* (1), and if it is to be questioned upon the authority of the English case, it must be in the Court of Appeal.

For these reasons I am of opinion that judgment ought to be for the defendants, and that the information should be dismissed with costs.

JOHNSON and GIBSON, JJ., concurred.

Solicitor for the Inland Revenue: *R. O'B. Furlong.*
Solicitors for the defendants: *Moore, Keily & Lloyd.*

R. ST. J. C.

QUEEN *v.* CLARKE (2).

Appeal. 1905. Dec. 8, 15, 21.

Employer and workman—Workmen's Compensation Act, 1897 (60 & 61 *Vict.* c. 37), s. 7—*Dependency on workman's earnings at time of death—Widow of deceased workman—Workman out of employment.*

The applicant, the widow of a deceased workman, was married on the 15th July, 1904, at Glasgow, both she and her husband being Scotch by domicil. She lived with her husband in Glasgow, and was supported by him till the end of October, 1904, when, being out of work, he went over to Dublin to seek employment. He obtained employment from the respondent on the 9th January, 1905, and, on the 17th January, 1905, he was accidentally killed by a fall from a window of a house in Dublin. From the time the husband left Glasgow until his death he did not contribute anything to the support of his wife, who went to reside with her father in Glasgow, and was supported by him. A posthumous child was born on the 15th April, 1905. Upon a claim for compensation brought on behalf of the widow and the infant child, the Recorder of Dublin held that the applicants were in part dependent on the earnings of the workman at the time of his death, and awarded compensation accordingly:—

Held, by the majority of the Court of Appeal (Walker, C., and Holmes,

(1) 32 L. R. Ir. 574.
(2) Before WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

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L.J.; FitzGibbon, L.J., *dissentiente*), that the applicants were wholly dependent upon the earnings of the workman at the time of his death, within the meaning of sect. 7 (2) (a) of the Workmen's Compensation Act, 1897.

Per FitzGibbon, L.J., that the Recorder's findings were that the applicants were not wholly dependent upon the earnings of the workman at the time of his death, and that they were in part so dependent; and that such findings could not be disturbed.

APPEAL by the applicants from an award of the Recorder of Dublin, dated the 14th July, 1905, so far as it directed that the compensation to be paid to the applicants shall be £140, and that the said amount may be increased.

Samuel Reeves Queen married the applicant Minnie Queen, on the 15th July, 1904, at Glasgow: they were both Scotch by domicil. They lived together in Plantation-street, Glasgow, until October, 1904, when he left to go to Dublin to seek employment. He had supported his wife until then. He obtained employment as a house painter, from the respondent James Clarke, in January, 1905, under the name of Samuel M'Neill, being his mother's name. On the 17th January, 1905, he was accidentally killed by a fall from a window of a house in North Great George's-street, Dublin. Mrs. Queen had lived with her father in Glasgow after her husband left, and had received nothing from her husband by way of support. A posthumous child was born on the 15th April, 1905. Mrs. Queen was a minor, and the claim was brought on her behalf, and on behalf of the infant child, by her father, William Henderson.

In the answer served on the part of the respondent, the respondent pleaded that the accident occurred through the wilful misconduct of the deceased.

At the hearing before the Recorder a considerable part of the hearing was taken up with proof of identity. This arose in consequence of the deceased having entered into the employment of the respondent in Dublin under the name of Samuel M'Neill. In the end, the Recorder was satisfied that Samuel M'Neill was the same person as Samuel Reeves Queen.

Counsel for the respondent then contended that the applicant was not a person wholly dependent on the earnings of the workman at the time of his death, and that from October, 1904, the

husband had not contributed to the support of the applicant. Counsel for the applicant relied on the point of dependency not being taken in the answer, and did not contest this argument. The Recorder's notes then stated—

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> "The case having closed, I asked counsel what was the maximum sum —*i.e.*, deciding everything in the applicant's favour. I was answered, '£234.' I then asked whether it was contended that, if I found dependency, I was bound to award and apportion that sum, or was I at liberty, under the statute, to award a smaller and different sum. I was answered, I could award the sum I thought reasonable. The counsel in the case were, of course, aware what I was dealing with. Having been so informed, I gave judgment, dealing with the authorities cited, and held there was, having regard to the relationship of husband and wife, a sufficient dependency to enable me to make the award. I acted on the statement I have referred to, and gave, as the proper and reasonable amount, £140, *i.e.*, £60 to the widow and £80 to the posthumous child, with costs. The evidence did not convince me that the application was, in fact, within sub-sect. 1 of sect. 1 of the first schedule of the Act of 1897, and I accordingly did not so find."

Mrs. Queen appealed.

L. H. Rosenthal, for the appellant:—

I submit that the applicants were wholly dependent upon the earnings of the workman at the time of his death, within the meaning of section 7 (2) (*a*) of the Act of 1897. The wife had no other source of income, and acts of charity or kindness cannot be relied on, because there is no obligation to continue them. There is a presumption of dependency from the legal position of husband and wife: *Cunningham* v. *M'Gregor & Co.* (1). The test by which to determine whether dependants were wholly dependent on the earnings of the workman at the time of his death, within the meaning of the Act, is whether what the workman was earning at the time of his death was the sole source to which they could look for maintenance at the time: *Pryce* v. *Penrikyber Navigation Colliery Co.* (2).

[WALKER, C., referred to *Coulthard* v. *Consett Iron Co.* (3).]

(1) 3 F. 775. (2) [1902] 1 K. B. 221. (3) [1905] 2 K. B. 869.

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Gerald Fitz Gibbon, for the respondent:—

The applicant, Mrs. Queen, was not dependent, in whole or in part, on her husband at the time of his death, either on the words of the statute, or on the rules of common law. The respondent did not serve any notice of appeal, so he can only ask that the Recorder's decision be affirmed; but I shall argue that Mrs. Queen was not dependent at all.

The question of dependency is one of fact only, and the word dependant in schedule 1, 1 (*a*) and in section 7 (2) (*a*) of the Act means a person who is dependent, in fact, without any regard to legal obligation: it means one who is maintained, in whole or in part, by the earnings of the workman at the time of his death, and a person who is not in fact so maintained, though legally entitled to be so, is not "dependent on the earnings": *Hoddinott* v. *Newton, Chambers, & Co.* (1). The date of death is the period for ascertaining the facts: *Pryce* v. *Penrikyber Co.* (2). The language of the statute is not technical: *Fenton* v. *Thorley & Co.* (3); *Powell* v. *Main Colliery Co.* (4). You cannot bring in legal presumption of liability derived from the common or civil law, or from the poor law. The legal liability of a son under the poor law to contribute to support his father, who has become chargeable on the rates, does not make the father a dependant: *Rees* v. *Penrikyber Navigation Colliery Co.* (5); *Davies* v. *Main Colliery Co.* (6). It is not sufficient that the person should be in receipt of pecuniary benefit: *Simmons* v. *White* (7); *Howells* v. *Vivian* (8). In the latter case, a sum of money contributed by a son was received by the applicant as part of his means of living. There is no higher obligation on a husband to maintain his wife, than there is upon a father to maintain his son, or *vice versâ*: 1 & 2 Vict. c. 86, s. 52; and 10 Vict. c. 31, s. 8.

The obligation of a husband to support his wife is based solely on the poor law, or on the doctrine of agency. Agency must be proved, or inferred, as a matter of fact, and can only be

(1) [1901] A. C. 55.
(2) [1902] 1 K. B. 221.
(3) [1903] A. C. 447.
(4) [1900] A. C. 371.
(5) [1903] 1 K. B. 259.
(6) [1900] A. C. 358.
(7) [1899] 1 K. B. 1005.
(8) 85 L. T. (N.S.) 529.

inferred when the spouses are living together; and there was no proof of that here. The decision in *Coulthard's Case* (1) was based upon a supposed "direct obligation on the part of the workman to maintain his wife," and on the Scotch cases. There is no direct obligation on a husband to maintain his wife: see judgment of Hale, C.B., in *Manby* v. *Scott*, in Bacon's Abr. Baron et Feme H.; *Ball* v. *Montgomery* (2); M'Queen on Husband and Wife, p. 77. The decision in *Coulthard's Case* (1) is inconsistent with the previous decision of the Court of Appeal in *Rees* v. *Penrikyber Co.* (3). If Collins, M.R., be correct, a millionaire wife is wholly dependent on her pauper husband. The Scotch cases do not apply, because by Scotch law a husband is bound to aliment his wife; and Lord Moncrieff bases his decision upon this liability. The Scotch law is stated by Lord Watson in *Clarke* v. *Carfin Coal Co.* (4). The difference between the law of the two countries is stated in Patterson's Compendium of English and Scotch Law, p. 279. In Scotland a parent is bound, *ex debito naturali*, to aliment a child, and so is a child bound to aliment a parent. Other relations are liable also, and then he gives the priority in which they are liable. A husband is bound at common law to aliment his wife, and she may raise an action of aliment: *ibid.*, p. 297. See also Bell's Dictionary of Scotch law—Title "Aliment."

There was evidence to support a finding that the applicants were only partial dependants, because they were, in fact, being maintained by, and therefore dependent on, Mrs. Queen's father. If he had been killed, they would have been entitled to compensation as, at least, partial dependants upon him; and if so, they could not be wholly dependent on S. R. Queen. By Scotch law, the father was legally liable to aliment his indigent daughter and her child; and the wife in the present case was maintained, not as in *Coulthard's Case* (1) "by charity or doles," but by a parent, who was by the law of her domicil legally bound to support her and her child. The parties here have a Scotch domicil.

The decisions of the English Court of Appeal are not binding on this Court; and in cases under the Workmen's Compensation

(1) [1905] 2 K. B. 869.
(2) 2 Ves. Jun. 195.
(3) [1903] 1 K. B. 259.
(4) [1891] A. C. 417.

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Act, this Court has dissented from their view: *Reddy* v. *Broderick* (1).

Dec. 21.

WALKER, C.:—

This is a claim by the widow of Samuel Reeves Queen, who was accidentally killed on the 17th January, 1905, under circumstances which admittedly create a liability to compensation under the Act of 1897; and the only question which we have to consider is whether the widow was dependent on his earnings at the time of his death, and if so, whether wholly or only partially so. If she was wholly dependent, it is admitted, for the purpose of the argument, that the amount of compensation to be awarded would be £234; but I do not think we have power to fix the amount. The Recorder has awarded for her and her child—a posthumous one—the sum of £140, out of which he has given £60 to the widow, and £80 to the child.

The Act of 1897 defines "dependants" to mean "In England and Ireland such members of the workman's family specified in the Fatal Accidents Act, 1846,"—these being the wife, husband, parent, or child—"as were wholly, or in part, dependent upon the earnings of the workman at the time of his death." The Fatal Accidents Act of 1846 throws no further light on the subject.

It occurs to me that the most convenient mode of dealing with the case is—(1) to ascertain and state the facts about which really there is no dispute; (2) to see how the Recorder has dealt with the case, having those facts before him; and (3) to state the view of the law which applies, having regard to the relations of husband and wife in the present case; and, lastly, having seen what the Recorder has done, to come to a conclusion as to the order which should be made.

It appears that the applicant, Minnie Queen, was married to the deceased in Glasgow on the 15th July, 1904. She was then, and is still, a minor; she had been previously in domestic service. After the marriage she lived with her husband, in Glasgow, to November, and was supported by him out of his earnings; and in the last days of October he went over to Dublin, where he

(1) [1901] 2 I. R. 328.

had worked before, in order to get employment in his trade, by means of which he might be able to continue to support her out of his earnings. He got work from the respondent some ten days before his accidental death, which happened on the 17th January. He was a painter by trade, and had married under the name of Samuel M'Neill—his mother's name—but his real name was Queen. It does not clearly appear, but I rather infer both were domiciled in Scotland, if that be material. It cannot be disputed that she was wholly dependent upon the earnings of the deceased from July to November. After the deceased went to Dublin she went to her father's house, and was maintained by him, as the deceased was not actually earning; but there was no evidence of desertion, nor did it appear that the applicant had any means of subsistence of her own, or was earning anything; and they were not living apart under any agreement that she should remain separate, or work for her own living, or be maintained by relatives, or by any person other than the deceased; nor is there any circumstance proved which could interfere with or modify the obligations of the husband to maintain his wife, whether under the doctrine of *Manby* v. *Scott* (1) or otherwise. The child was born on the 15th April, 1905.

The mode in which the Recorder has dealt with the case on the facts appears on his notes. He says he was told by counsel that the *maximum* sum which could be awarded was £234, and proceeds—"I then asked whether it was contended that, if I found dependency, I was bound to award and apportion that sum, or was I at liberty, under the statute, to award a smaller and different sum? I was answered, I could award the sum I thought reasonable." He then says: "Having been so informed, I gave judgment dealing with the authorities cited, and held there was, having regard to the relationship of husband and wife, a sufficient dependency to enable me to make an award. I acted on the statement I have referred to, and gave, as the proper and reasonable amount, £140"; and he adds "the evidence did not convince me that the applicants were in fact within sub-sect. 1 of sect. 1 of the first schedule of the Act of 1897," that is, wholly dependent, so

(1) Bacon's Abr. Baron et Feme H.

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that on the facts he must have decided there was partial and not total dependency.

The contention before us is that in point of law, on the facts, he should have found total dependency, and that he misdirected himself in not doing so. Dependency, whether whole or partial, is a question of fact; but I think in the case of husband and wife the facts in proof may be such that the County Court Judge is bound, in point of law, to find total dependency.

Mr. Fitz Gibbon, in his able argument for the respondent, put forward three contentions—(1) He contended that dependency is a mere question of fact, and that to satisfy the statute the wife must, at the moment of the workman's death, be actually dependent on his earnings, and maintained by them. This he argued, relying on the words of the section, "at the time of his death." That argument seems to me to go much too far. It would apply to every case where the husband was in fact earning nothing by reason of being then out of work, or when his wages were accruing, payable at fixed periods, the first of which had not arrived, and many other cases which would plainly be contrary to the provisions of the statute. (2) He argued that dependency being a question of fact, the father who had supported the applicant from November, when the deceased went to look for work, was the person on whom she was in fact dependent, and, that if he had been killed she would have a claim in that case as a dependant. I do not think we are called on to decide that question. There would, in my opinion, be difficulty in establishing it in favour of the claimant in such a case if there was a husband on whom she was totally dependent; and I cannot think that the staying of a married woman in her father's house, while the husband was looking for work which would enable him to maintain her, would make her cease to be wholly dependent on her husband's earnings. I admit legal obligation to maintain does not, *per se*, solve this question, for it may exist, and yet the wife may not be, on the facts, either wholly or partially dependent.

Lastly, Mr. Fitz Gibbon contended, admitting that there was at least one Scotch case, and the very late case in the English Court of Appeal, which were not distinguishable from the present, that we should decline to follow those cases. I say at once that, if we find

a clear decision of the Court of Appeal in England on this Imperial statute, I should not think myself at liberty to disregard it because I might not agree in all the reasoning of the Judges. In this case, however, I agree in the judgment in *Coulthard* v. *Consett Iron Company* (1).

The decision in *Pryce's Case* (2) was really that money coming to the wife after the death of the deceased, and by reason of his death, such as insurance money, could not be taken into account as depriving her of the position of being wholly dependent on his earnings at his death. *Simmons* v. *White* (3) was a case in which the wages of the boy killed went into a common fund, out of which father and mother were maintained, and the County Court Judge held that they were, as a fact, partially dependent on his earnings, and the Court of Appeal affirmed the County Court Judge.

In *Davies* v. *Main Colliery Co.* (4) a similar decision was pronounced by the County Court Judge, with a similar result on the appeal both in the Court of Appeal and House of Lords. As a fact, there was evidence there that the father was dependent.

The two Scotch cases of *Sneddon* v. *Addie & Sons' Collieries* (5) and *Cunningham* v. *M'Gregor* (6) are stronger than the present, and they show that Scotch law, if it applies here, does not strengthen the respondent's case.

In the first of these cases the facts were that in July, 1901, the husband deserted his wife, and thereafter did not contribute anything to her support; she suffered from chronic bronchitis and varicose veins to an extent which incapacitated her from work requiring ordinary exertion, and she became unable to do anything for her own support; her husband having, in 1904, in the course of his employment, sustained injuries from which he died, she claimed compensation under the Workmen's Compensation Act, 1897. It was held (*dubitante* the Lord Justice Clerk) that the claimant was dependent on the earnings of her husband at the time of his death. There total dependency was found by the Sheriff.

(1) [1905] 2 K. B. at p. 869.
(2) [1902] 2 K. B. 221.
(3) [1899] 1 K. B. 1005.
(4) [1900] A. C. 358.
(5) 6 F. 992.
(6) 3 F. 775.

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Lord Moncrieff in giving judgment said—

> "If, in order to constitute total dependency in the sense of the statute, it is essential that the deceased workman was, at the date of his death, supporting the respondent, the judgment is wrong, because the deceased man did not contribute a farthing to her support from the time that he deserted her in 1901. But I do not think we are tied up to such a construction of the statute. A husband is primarily bound to aliment his wife. Exceptional cases, no doubt, may be figured in which, notwithstanding that primary obligation, the wife could not be said in any reasonable sense to be wholly dependent on his earnings. She might have means of her own, or she might be earning her own livelihood, or she might be living apart from her husband under an express or implied agreement with him that she would make no claim upon him, but look for support either to her own exertions or to her relatives."

In the second case of *Cunningham* v. *M'Gregor & Co.* (1) the husband lived apart from his wife and family, and supported them to this extent that he contributed about £5 a year to their support. But the question raised was not whether the wife was partially dependent on him—that was admitted—but whether she was wholly dependent upon him. The Court held unanimously that she was wholly dependent on her husband. The argument for the respondents in that case, which was unsuccessful, was that the wife was not wholly dependent on her husband, because she was supported by occasional employment and contributions from her relatives. That argument was negatived by the judgment of the Court. There the Sheriff had found differently, and the order made was—

> "Sustain the appeal. Find that on the facts as stated the appellant was wholly dependent on her late husband, while the lawful child of the deceased was only partially dependent on him: therefore, recall award of the arbitrator, and remit to him to award compensation in terms of the finding of this arbitration."

The Master of the Rolls, Sir R. Henn Collins, adopts and relies on that decision. In *Coulthard's Case* (2) the facts were not so strong in favour of the wife as here. There the facts,

(1) 3 F. 775. (2) [1905] 2 K. B. 869.

as stated by Henn Collins, M.R., in his judgment, were that the husband had ceased to live with his wife for some months before his death, and he had gone to another town to seek employment. He got work a month before the accident which caused his death, and was then earning wages. The wife, after her husband left her, had no regular means of subsistence. She did casual work, when she could get it, and received doles from relatives, whose charity kept her alive. The County Court Judge found that the applicant was dependent upon her husband's earnings at the time of his death. The counsel for the employer contended that this was wrong, and to support that contention they had to show that the County Court Judge misdirected himself in point of law, for they could not quarrel with his finding of fact, if there was any evidence to support it.

The Master of the Rolls then refers to the two Scotch cases, and he concludes—"The decisions of the Scotch Courts are no doubt not binding authorities in this Court, but they are entitled to the greatest weight. Assisted by those decisions, I come very clearly to the conclusion that the applicant was in this case dependent on her husband's earnings at the time of his death, and, therefore, that the decision of the County Court Judge was right." Romer, L.J., said—"The husband was earning wages at the time when the accident happened. He had, apparently, left his wife to look for work, and had been away about three months after a previous cohabitation of many years, during which he maintained her. During those three months she had tried, as far as she was able, to support herself; but it is clear to my mind that she was unable to do so, and she had no source of income of her own upon which she could depend for subsistence. She was, therefore, dependent on somebody else for maintenance at the time of her husband's death. Seeing that she had a husband who was earning wages, whose duty it was, and who was legally liable, to support her, might it not reasonably be inferred that she was dependent on his earnings at the time of his death? I think it might be so inferred, unless there were other circumstances sufficient to justify the conclusion that she had ceased to look to her husband's earnings for maintenance."

The judgment of Mathew, L.J., is even stronger, as he

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considered that the element of legal obligation was sufficient by itself. He says (after stating the facts), "Under these circumstances I do not think that the evidence supports the conclusion that the applicant was not dependent on the deceased workman's earnings at the time of his death. It was suggested that she was at any rate only partially so dependent. I entirely deny that she can rightly be said to be only partially dependent on her husband because, by the alms of relatives, she was supplied to some extent with the means of subsistence. She had no right to such alms, and they did not to any extent render her independent." In my opinion, the facts in this case are stronger for the maintaining of total dependency from marriage to death; and the reasoning of the Judges in the Court of Appeal is in every word applicable. I am of opinion we should allow the appeal, and remit the case to the Recorder with a declaration that, in our opinion, on the facts as stated, the appellant was wholly dependent on her late husband.

This will follow exactly the course adopted in *Cunningham* v. *M'Gregor* (1) once, as matter of law, we come to the conclusion on the facts proved that the wife was wholly dependent.

I think there should be no costs of the appeal.

FITZ GIBBON, L.J.:—

Bearing in mind that our authority under the Workmen's Compensation Act is strictly limited to the determination of questions of law, and that the jurisdiction to find facts, and to draw inferences of fact, exclusively belongs to the County Court, I am unable, on the evidence in this case, to disturb the Recorder's award. In the words of Collins, M.R. (1) —"We cannot quarrel with his finding of fact, if there was any evidence to support it."

The Recorder has awarded an amount of compensation less than the statutory *minimum* (2) to which the applicants would have

(1) *Coulthard's Case*, [1905] 2 K. B. 872.
(2) 60 & 61 Vict. c. 37, s. 7 (2) a.

been entitled if "wholly dependent upon the earnings of the workman at the time of his death"; he has thus inferentially found that they were only in part so dependent. On that basis he was correctly told that he should award a reasonable and proportionate amount—necessarily less than the *minimum* for persons "wholly dependent." He has awarded £140, and that award cannot be altered, unless the applicants are entitled, as of right, and as matter of law, to the statutory *minimum* of £234.

The employer first contends that, on the evidence, the applicants were not at all "dependent" within the meaning of the Act but he has not appealed, and he does not now seek to escape payment of the £140 awarded, though he relies on the contention that he ought not to have been held liable to pay anything, as an answer to the applicant's appeal for more.

I find it impossible to doubt that the right questions were tried and decided by th Recorder, who reports that—

> "It was contended for the respondent that the applicant was not a person wholly or in part dependent on the earnings of the workman at the time of his death. In October, 1904, he had not contributed to the support of the applicant. . . . The question 'in whole or part' is one of fact; it does not arise from the circumstances that in law bound to support."

The cases cited here were cited below. Though the Recorder reports that counsel for the applicants, in reply, altogether relied on the point of dependency not being taken in the answer, and did not contest the argument for the respondent, at the close of the case he asked both counsel what was the *maximum* sum—*i.e.*, deciding everything in applicant's favour (which must mean deciding that it was a case of total dependency), which he could award; he was answered £234. He then asked whether it was contended that if he found dependency (which must mean dependency in part only) he was bound to award and apportion that sum, *i.e.* £234; or was at liberty under the statnte to award a smaller and different sum. He was answered that he could award a smaller and different sum; that he could award the sum he thought reasonable.

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This answer was right, if it was a case of dependency in part only. The Recorder says—

> "The counsel in the case were, of course, quite aware what I was dealing with. . . . Having been so informed, I gave judgment, dealing with the authorities cited, and held there was, having regard to the relationship of husband and wife, *a sufficient dependency to enable me to make an award.* I acted on the statement I have referred to, and gave, as the proper and reasonable amount, £140."

In the face of this clear, correct, and explicit report, I cannot impute to the learned Recorder that he overlooked the rudimentary law that if he found *total dependency* he must award £234, and that his award of £140 must rest on a finding of *dependency in part only.* For convenience in dealing with the arguments on each side, I resolve the Recorder's decision into two propositions of fact, viz. :—

> 1. That the applicants were "dependent upon the earnings of the workman at the time of his death."

This proposition is disputed by the employer.

> 2. That they were not "wholly," but only "in part," so dependent.

This proposition is disputed by the appellant, who sues as next friend of the widow and child, both under age, of the deceased workman. The marriage took place on July 15, 1904 ; the death on January 17, 1905 ; and the birth of the child on April 15, 1905. As the right to compensation arises upon dependency at the time of the death, the fact that the child was posthumous is material only in making the circumstances—and consequently the rights—of mother and child identical. For brevity, I henceforth mention the wife only.

On the first proposition, I cannot adopt the employer's contention. It is impossible to do so without refusing to follow the decision in *Coulthard's Case* (1), which counsel logically asserted to be wrong. It is a decision of the highest authority, short of the House of Lords. But in cases like this, where our decision is final,

(1) [1905] 2 K. B. 869.

while treating the decisions of sister Courts with the greatest respect, we are responsible for our own judgments. We cannot content ourselves by following English decisions. It has been held in *Reddy's Case* (1) that we must form, and act on, our own independent opinion. There we deliberately dissented from a decision of the English Court, and the House of Lords afterwards agreed with this Court. The same course has been followed more than once in registration cases: a majority of this Court followed an English decision in *Hasson* v. *Chambers* (2), and it afterwards became necessary to convene a full Court to overrule their conclusion.

In *Coulthard's Case* (3) the question was one of fact—viz. total dependency; and the decision of the County Court was affirmed. The decision of the Court of Appeal cannot go beyond what Romer, L.J., says:—

> "That it cannot be said, upon the evidence in this case, that the learned County Court Judge could not reasonably have come to the conclusion that the applicant was so dependent."

I agree with that decision, so far as it established *dependency*, and that is enough to negative the employer's first contention here. But it cannot establish *total* dependency here, unless the evidence was identical in the two cases, and when I come to the applicant's contention on the second proposition, I must show the difference of fact which prevents *Coulthard's Case* (3) from ruling this case. At present, I accept it as an authority for "*dependency in fact*," without regard to degree.

The objections urged against the decision mainly rest on two passages in the judgment of Collins, M.R., in the first of which he speaks of "a *direct obligation* on the part of the workman to support the applicant." This he mentioned as "an important fact," and undoubtedly the relation between the workman and applicant is most important on the question of dependency. He also relied to some extent upon three Scotch cases (4), and it was contended that, in so doing, he overlooked the effect of the Scotch law, which imposes a direct mutual obligation of "alimenting"

(1) [1901] 2 I. R. 332.
(2) 18 L. R. Ir. 68.
(3) [1905] 2 K. B. 869.
(4) *Whitefield's Case*, 6 F. 822; *Sneddon's Case*, 6 F. 922; *Cunningham's Case*, 3 F. 775.

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certain relatives, including husband and wife, and parent and child, which is unknown to the law of England and Ireland.

This Scotch law becomes important upon the second proposition in this case. I pass it for the present, and now proceed to give my reasons for holding as I do, so far in agreement with *Coulthard's Case* (1), that "dependency" is established in the present case. I do not base that conclusion on any "direct obligation" to maintain either wife or child, and I do not believe that, in using that phrase, Collins, M.R., ignored the English law which Macqueen (2) summarizes in these words:—

> "In fact, a wife has no direct claim upon her husband under any circumstances whatever."

In our law a husband's duty to maintain his wife is one of imperfect obligation, enforceable only through the Poor Law, the Law of Agency, or the Ecclesiastical Law. It is only necessary to read the Workmen's Compensation Act itself to see that "dependency" under it does not rest on any of these. Though the existence of a moral, natural, and indirect obligation is "an important fact" in determining whether dependency exists for the purposes of the Act, that dependency arises from the co-existence of the fact of support with the relationship defined by the Act, sect. 7 (2).

> "'Dependants' means—
>
> "(*a*) In England and Ireland, such members of the workman's family specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death; and,
>
> "(*b*) In Scotland, such of the persons entitled according to the law of Scotland to sue the employer for damages or *solatium* in respect of the death of the workman as were wholly or in part dependent upon the earnings of the workman at the time of his death."

The members of the workman's family specified in the Fatal Accidents Act, 1846, are, in the first instance, "wife, husband, parent, and child." But sect. 5 enacts that—

> "'Parent' shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and 'child' shall

(1) [1905] 2 K. B. 869. (2) Husband and Wife, 2nd ed., p. 43.

include son and daughter, and grandson and granddaughter, and stepson and stepdaughter."

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Reading this interpretation clause into the Workmen's Compensation Act, 1897, it becomes impossible to limit "dependency" to relationships in which any obligation of maintenance whatsoever known to our law exists; and it becomes clear that dependency in fact, coupled with the defined relationship, is the test of liability.

If authority is needed, *Howells' Case* (1), and *Davies' Case* (2), in the House of Lords, show that obligation to maintain is not essential, and that dependency between relatives of the specified degrees is mutual, and arises from the "general obligations" existing between them. Furthermore, it has been decided that a father, who was the primary and main support of his family, was "dependent" on a son whose earnings went into the family fund; and even that a husband may be dependent on his wife.

It is unnecessary to discuss the interesting question whether we should read this particular Act as Lord Macnaghten suggests in *Fenton's Case* (3), as one in which—

> "Parliament was making a new departure in the interest of labour, and legislating for working men, presumably in language that they can understand."

or whether Lord Brampton more correctly described it in *Hoddinott's Case* (4), in the following words:—

> "The whole statute is full of incongruities. In it so many things are said which could not have been meant, and so many things which must have been meant are left unsaid, that one has often great hesitation in even forming a conjecture as to what may have been the views and intentions of its framers."

The evidence on which the employer relies to show that the wife in this case was not dependent upon her husband's earnings at the time of his death was simply this—that though he had lived with and supported his wife on his earnings from their marriage on July 15, 1904, he left her in Scotland in October—the precise date was stated by counsel to be October 28—to go to Dublin for a week, and he did not afterwards write to her, or con-

(1) 85 L. T. (N. S.) 529.
(2) [1900] A. C. 358.
(3) [1903] A. C. 443.
(4) [1901] A. C. 65.

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tribute to her support, down to his death on January 17, 1905—a period of two and-a-half months.

He had worked in Dublin four years before, with the defendant Clarke. When leaving Scotland, he said that if work were going, he would get it. He did not go to work with Clarke until six days before his death; there is no evidence as to what he was doing, or whether he was earning more than enough to support himself, in the meantime. He was known in Dublin under his mother's name, but on his wife's evidence he seems to have used the same name in Scotland. His wife knew where he had lived in Dublin previously, and he went to the same place on his last visit here. There is no evidence that he deserted his wife, or that he came to Dublin with any intention of permanently separating from her, or of evading his marital obligation to support her, if or when his earnings enabled him to do so.

The circumstances in *Coulthard's* (1) and *Cunningham's Cases* (2) indicating a failure to perform this obligation, were stronger than in the present case, and for that reason we could not hold that there was no evidence of "dependency" here, without refusing to follow those authorities. But the ground on which I reject the defendant's contention is broader than any mere consideration of details. I rest my opinion on the object of the Act, and on considerations of natural law, and of human life. The object of the Act is to provide *compensation* for prospective pecuniary loss caused by the death of a working man, and by the consequent destruction of his power to earn money which, if he lived, would probably be spent, in due proportion, for the benefit of those naturally dependent on him. The object is the same as that of the Fatal Accidents Act, 1846.

Under the Workmen's Compensation Act, the workman must be earning wages at the time of his death, for his earnings at that date are the measure of the compensation. But I cannot hold that his earnings must, at that date, be actually applied towards the support of those dependent on him. Whether "dependency" in fact exists at that time is a question of fact, and that question should, in my opinion, be answered in the affirmative if there is what Bishop Butler calls "probable evidence" to warrant the

(1) [1905] 2 K. B. 872. (2) 3 F. 775.

conclusion that, if the workman had lived, the applicant, being within the statutory definition of a dependant, would have received pecuniary benefit from his earnings.

I answer the first proposition in the applicant's favour, because I am satisfied that there is sufficient evidence that if Queen had not been killed, his wife and child would have been, to an appreciable extent, supported by his earnings. In this conclusion I am supported by the authority of *Coulthard's* (1) and *Cunningham's Cases* (2).

But before I can take these cases as authorities for the second proposition—viz., that at the time of Queen's death his wife was *wholly* dependent on his earnings, I must compare the facts of those cases with the facts proved in this case.

A juxtaposition of the facts of the three cases, so far as we know them, will show how widely they differ in the statement of the applicant's means of living at the crucial date—

Queen's Case.

The husband supported his wife from their marriage until October 18, 1904. From that date until his death he contributed nothing to her support. When he left Scotland, she went to her father's house, and *William Henderson, her father, supported her during the rest of her husband's life*, and was still supporting her when the case was heard by the Recorder on July 14, 1905. During that period there is no evidence that she had any means of subsistence, except what she got from her father.

Coulthard's Case.

The wife had no means of her own, and while her husband was away her only means of subsistence consisted of casual pieces of employment, and *the charitable gifts* of relations. She was for a week in the workhouse.

Cunningham's Case.

The husband had, during the three years preceding his death, lived separate from his wife and family, without any arrangement for maintaining them. The average sum contributed by him towards their support did not exceed £5 per annum. The wife had no regular means of livelihood other than occasional employment, and what was contributed by her relatives, and the dole from her husband, above mentioned. Lord Moncrieff described what she got from her relations as "*charitable contributions.*"

(1) [1905] 2 K. B. 869. (2) 3 F. 775.

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It is self-evident—(*a*) that no person can be actually dependent, in fact, *wholly* upon each of two people at the same time; and—(*b*) that if a woman is *in part* dependent upon her father, she can not be wholly dependent upon her husband.

I am willing to admit that, when a wife has no other means of subsistence, it may be reasonable to find, as a fact, that she is wholly dependent on her husband's earnings, though she is forced to seek charity, or to enter the workhouse, to obtain the necessaries of life which her husband has failed to provide for her. *Coulthard's* (1) and *Cunningham's Cases* (2) decide no more than this, on the facts there proved. But I confess that I should have thought it a more reasonable inference from the facts, in each of those cases and also in *Pryce's Case* (3), that at the time of the workman's death the wife and family were actually, and in fact, only in part dependent upon his earnings; being only in part, if at all, actually supported, or likely to be supported, by his present or future earnings. To that extent, with all due respect, I doubt the soundness of those decisions. I also find it hard to reconcile them with the terms in which the House of Lords has defined actual dependency in fact, at the time of the death, as the test; and it seems still harder to reconcile *Coulthard's Case* (1), on this point, with *Rees's Case* (4), where a father in the workhouse was held *not to be at all dependent* on his son's earnings, though under the Poor Law the son's obligation to support him was identical with a husband's obligation to support his wife.

But between the facts of all those cases and the facts of this case, I find the vital distinction that here the wife's father, for two and a half months before the husband's death, provided her with a home and with all her actual means of subsistence, and wholly supported her, in fact, without any assistance or contribution whatever from her husband's earnings.

The father here stood to his daughter in one of the relations specified in the Fatal Accidents Act, 1846, and he was under an obligation to maintain her, and she was "dependent" upon him, in a degree second only to her husband. I can not hold, as matter of law, that the facts of this case furnish *no evidence* that she was, *in*

(1) [1905] 2 K. B. 872.
(2) 3 F. 775.
(3) [1902] 1 K. B. 221.
(4) [1903] 2 K. B. 259.

part at least, dependent on her father. The Recorder has found as a fact that she was so dependent, and we have no power to set aside this finding if there was any evidence to support it.

We must decide the case according to our Irish law, and we cannot take judicial cognizance of Scotch law. But I see no reason to hold that in Ireland, as matter of law, if William Henderson had been killed by the wrongful act, neglect, or default of another, his daughter's claim for compensation under the Fatal Accidents Act, 1846, would have been answered by *mere proof that she was a married woman*, though she was wholly dependent upon her father for all the necessaries of life at the time of his death. Married daughters are often, temporarily or permanently, thrown by necessity upon their fathers for support, through inevitable misfortune, the act of God, or other causes, and become, though their husbands are alive, as wholly dependent on their father's earnings for livelihood as if they were unmarried.

When we come to the Workmen's Compensation Act, the case becomes far stronger. "Dependants" are differently defined for England and Ireland, and for Scotland. No reason can be suggested for making any difference between the rights of dependants in different parts of the United Kingdom. In interpreting and applying the Act and the decisions upon it, we are at liberty to consider the Scotch as well as the English law. This is a Scotch case. The father, the daughter, the marriage, and the child were all pure Scotch. So was the husband, except that he came twice to Ireland as a migratory labourer in search of work.

In what right, and under what obligation, did this wife receive her support from her father for the last two and a half months of her husband's life? When Lord Moncrieff, in *Cunningham's Case* (1), spoke of the "*charitable contributions*" of relatives, we must assume that he knew the law of his own country, and that he did not so describe contributions which were made in discharge of the Scotch obligation of "aliment," of which we must take cognizance in order to understand the Scotch decisions. Can Lord Moncrieff have been speaking of support in any way like that complete and continuous maintenance which Henderson provided

(1) 3 F. 775.

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for his daughter? Can he have imagined that such maintenance was no evidence of actual dependency in fact, within the meaning of the Workmen's Compensation Act?

We were referred to a text-book for a statement of the Scotch law (1). Though we may not be at liberty to act on such a reference, we are bound, in interpreting the decision in *Cunningham's Case* (2), and before we apply it to the present case, to read it by the light of any authoritative statement of the law which the Judges who decided it were administering. I can not call in an expert witness to help me, but I am fortunate in being able to quote that law from Lord Watson in the House of Lords.

In *Clarke* v. *The Carfin Coal Co.* (3), an action for damages or *solatium*, he expounded the law which gives that remedy against a person whose negligence has caused death, in terms identical with the Fatal Accidents Act, 1846. He said that it was given by reason of there having existed, between the pursuer and the deceased, in the first place, near relationship in blood; and, in the second place, a mutual obligation of support arising out of that relationship; and he quoted the following passage from Lord President Inglis:—

> "In the law of Scotland, differing in that respect from some other systems of jurisprudence, a claim of this kind is sustained at the instance of a wife for the death of a husband, a husband for the death of his wife, a parent for the death of his child, and a child for the death of his parent, when the death has been caused by *delict* or *culpa*. It appears to me that the true foundation of this claim is partly nearness of relationship between the deceased and the person claiming on account of the death, and partly the existence during life, as between the deceased and the claimant, of a *mutual obligation of support in case of necessity*."

In our case, Minnie Queen was driven back to her father's house, and wholly thrown upon him for her means of existence, by the necessity which arose when her husband left Scotland to seek his daily bread. The definitions of "dependants" in the Workmen's Compensation Act, for England and Ireland, and for Scotland, respectively, treat the Fatal Accidents Act, 1846, and the

(1) Patterson, Eng. & Scotch Law. (2) 3 F. 775. (3) [1891] A. C. 417.

right "according to the Law of Scotland to sue the employer for damages or *solatium*" as *in pari materia*; and I ask—On what ground could it be contended, in either part of the United Kingdom, if Minnie Queen's father had been a workman and had met his death by accident while she was living upon him, and in his house, that she was not "dependent upon his earnings," within the meaning of that definition?

In finding that she was only in part dependent on her husband, the Recorder has found by implication that she was in part dependent on her father. We cannot quarrel with that finding if there is any evidence to support it. In my opinion the weight of evidence is in favour of it, and the evidence that, at a previous date, her husband had supported her, and the inference of fact that, at some future date, he would do so again, if his earnings enabled him so to do, are entirely consistent with it. This evidence and inference sustain the Recorder's first finding that she was *in part* dependent on her husband, and they establish the consistency of his second finding that she was, at the same time, in part dependent on her father also. The second finding is, in law and fact, a corollary of the first.

I desire to decide this case upon the clear and sufficient ground that there was evidence to sustain the finding that the applicant, at the time of her husband's death, was, at least in part dependent upon her father for her support, and consequently that she was not then wholly dependent upon her husband's earnings. I reserve my judgment upon every other question, but I must say that, as at present advised, it seems to me to be contrary to the popular and ordinary meaning of words to describe her as then *wholly dependent* upon her husband.

It is now attempted to push *Coulthard's* (1) and the Scotch cases (2) to the extent of holding that—(*a*) a married daughter supported by her father—(*b*) a sturdy beggar living upon "charity,"—(*c*) a charwoman eking out a precarious existence by "odd jobs," and—(*d*) an inmate of the workhouse, each having a husband earning wages, but contributing little or nothing to his wife's maintenance, are one and all, *as matter of law*, as wholly dependent

(1) [1895] 2 K. B. 869. (2) *Ante*, p. 149, note (4).

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upon husbands' earnings, and are, under the Workmen's Compensation Act, entitled as of right to the same amount of compensation for the husband's death, as the poor widow of an industrious home-keeping workman, who loses "all her living" by her husband's death.

I decline to follow them so far, until further argument, or a decision of the House of Lords, compels me to do so.

HOLMES, L.J. :—

This appeal arises from a claim for compensation under the Act 60 & 61 Vict. c. 37, on behalf of the widow and the posthumous child of Samuel Queen, a house painter, who was accidentally killed while at work, in the employment of the respondent. It has been assumed that the circumstances of the accident were such as to entitle the claimants to compensation provided that they are "dependants" within the meaning of the statute; and the only fact in controversy before the Recorder was whether the deceased was the Samuel Queen who married Minnie Queen in July, 1904. There was some difficulty in identifying him, in consequence of his having been generally known by his mother's name—M'Neill; but the evidence established that he was the husband of one claimant, and father of the other. Counsel for the employer then argued that the undisputed facts deposed to by the witnesses showed that the wife was neither wholly, nor in part, dependent upon the earnings of the workman at the time of his death, and that the posthumous child must be held to be in the same position. The only reply given to this contention by counsel for the claimants was that it was not raised by the respondent's answer; but the Recorder does not seem to have ruled this point, inasmuch as he was prepared to hold that, having regard to the relationship of husband and wife, there was a sufficient dependency to enable him to make an award in favour of the claimants. Before he gave judgment, there occurred an incident of which he has good reason to complain. He asked counsel on both sides what was the *maximum* sum he could award in the event of his deciding everything in favour of the applicants, and he was told £234. He then asked

whether it was contended that if he found dependency, he was bound to award and apportion that sum, or was he at liberty, under the statute, to award a smaller sum. The answer given to this question was, that he could award the sum he thought reasonable. One result of this unfortunate incident is that the mind of the Judge was not only not directed to the only point on which the appeal has been taken, but he was even given to understand that the point could have no legal existence. I have grave doubts whether in these circumstances the appeal ought to be heard; but as no objection on this ground has been taken at the Bar, I do not wish to pursue the matter further.

The evidence relating to the only question now in controversy is probably more meagre than it would have been if the efforts of counsel had not been directed to another issue; but it is, I think, sufficient to enable us to understand the position of Mrs. Queen before, and at the time of, her husband's death. It appears that from the 15th July, the date of her marriage, she lived with, and was maintained by, her husband down to the beginning of November. I am bound to assume that during this time she was wholly dependent on his earnings, as it is not suggested that either of them had any other means of livelihood. In November he was out of work, and he left Glasgow for Dublin in search of a job. Four years before he had been employed by the respondent, and he said if work was going he would be sure to get it. A house-painter's trade does not flourish at that season of the year; and we next hear of him in Mr. Clarke's employment on the 11th January, for whom he continued to work until the 17th, when he met with the fatal accident. I must assume that, after the 1st November until Queen's death, his wife was not supported by him, and I have no doubt that the Recorder is right in his recollection of her father's statement that in this interval she was maintained by him. These, as far as I can gather, are the only material facts to be extracted from the evidence; and form the foundation of Mr. Fitz Gibbon's argument in this Court, as well as in the Court below.

His proposition is, that the legal conclusion to be drawn therefrom must be, that the wife was not in any way dependent upon the earnings of her husband at the time of the accident. He begins,

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and rightly begins, with the definition of the statute. "Dependants means such members of the workman's family specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death." I agree with him that dependent here means *prima facie* dependent in point of fact. There is abundant authority to show that where a person voluntarily contributes from his earnings to the support of his family, the members of his family are, in whole or in part, dependent on these earnings, although he is under no legal obligation to make such contribution.

I am also of opinion that the legal or moral obligation to support a relative does not necessarily imply that such a relative is dependent, within the meaning of the statute, upon the person so bound to provide support.

I can conceive a wife, without means, who has separated from a wage-earning husband, and who has managed to live for some years without his help, being held to be neither wholly nor in part dependent upon his earnings at the time of his death. But this concession does not assist the respondent's counsel in the present case. He has rightly argued, in accordance with authority, that the Workmen's Compensation Act is not to receive a technical construction, that it uses the language of common life, and that its provisions are to be understood in the sense that naturally suggests itself to men untrained in legal subtleties. I apply this test to the definition of "dependants." The great majority of workmen's wives have no means of their own, and are prevented by their household duties from earning a living for themselves. Are not such wives dependent, in the ordinary meaning of the word, upon their husbands? Do they cease to be so, or are they less so, if from some sickness or scarcity of work the husbands are idle for a time, and they receive help from relatives or friends? Can an occasional money present, given in kindness of heart by a father to a married daughter, be used to show that she is not wholly dependent on her husband's earnings? I venture to say that what happened in this case is of constant occurrence in the lives of workmen. A man unable to get regular work where he lives, goes elsewhere to look for it. The little money he has is only enough to keep him until he gets a job, and

his wife stays with a relative or friend until his wages begin to come in again. This is the most favourable way of presenting the facts from the respondent's point of view.

The evidence does not suggest that Queen intended to desert his wife, or that he would not share with her his earnings in the future as he had done in the past; but I have assumed that until he would get work he was not in a position to maintain her. Let me, however, put the case in a somewhat different way. Let me suppose that the husband had saved from his earnings as much as would keep up the house in Plantation-street for three or four months, and was willing to do so; but that his wife said, "I shall be lonely here, and I am not well. My father will be glad to have me, and I shall pay him a visit until you come back or are settled in Ireland." According to Mr. Fitz Gibbon's argument, in that state of circumstances, it must be held that she was neither wholly nor in part dependent upon her husband's earnings at the time of his death; and in this he is strictly logical. The fallacy in his construction of the definition is reading it as if it ran—"such members of the workman's family as were wholly or in part being supported by the earnings of the workman at the time of his death." If these were the words, I can understand, although I might not adopt, the view that Mrs. Queen was not so supported from the end of October to the 17th January; but a woman cannot be properly described as dependent for her livelihood on casual acts of charity or kindness. I think that regard must be had to the element of duty. I do not say that legal right or obligation is necessary, although I believe in most civilised countries, and certainly in our own, a husband who has the means can be directly or indirectly compelled by law to maintain his wife.

Apart from Common Law, Ecclesiastical Law, or Statute, this duty is generally recognized; and when I find a man like Queen performing it as long as he is earning wages, and not seeking to evade it when work fails him for a time, I am prepared to hold that his wife, admittedly without means of her own, is wholly dependent upon his earnings until it is shown that there is some other source which she has the same right to look to for support. In this country, as far as I am aware, a father cannot be compelled by law to maintain a child over the age of fifteen,

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and I doubt if he is under any moral obligation to support a married daughter.

I have come to this conclusion by taking the words of the statute in connexion with the undisputed facts of the case, and the result would have been the same if there were no authorities bearing on the subject. Mr. Fitz Gibbon's industry has, I doubt not, brought to light all the decisions in his favour; but none of them seem to me to be inconsistent—at least in any substantial point—with what I have said. On the other hand, the last reported case in the English Court of Appeal goes much further in dealing with a wife's dependence on her husband's earnings than I have thought it necessary to do. This decision is attacked on the ground that the legal obligation of a husband to maintain a wife is erroneously stated, and that as this is the foundation of the judgment, the case is of no authority, and ought not to be followed.

I think we may give Sir Henn Collins, who edited Smith's Leading Cases, credit for having heard of *Manby* v. *Scott* (1), and knowing the law as therein laid down. I think we may also give him credit for knowing that by methods familiar to the English lawyer, a husband can be legally compelled to maintain his wife.

I have not thought it necessary to rest the present case on legal obligation; but I have no doubt that such an obligation exists. Although the Queens—husband and wife—were Scots by birth and domicil, I must deal with the case on the basis of Irish law. It is said that in Scotland a father is bound to maintain his daughter, and that therefore Mrs. Queen had a right to be supported by her father. On this point I can offer no opinion, as my judicial knowledge of a foreign system of jurisprudence is confined to what has been deposed to on oath by an expert, and no evidence has been given in relation thereto. I may be permitted, however, to say that I would listen with respectful wonder to an expert swearing that by the law of Scotland a father, whether he be laird or workman, is bound to aliment a married daughter whose husband possessed, or is capable of earning, the means of maintaining her, and who has not forfeited by mis-

(1) 2 Smith's L. C., 433.

conduct or otherwise her rights under the marriage contract. I would also add that I believe that the visits of a married daughter to her father's house in Scotland are like similar visits in other countries—that they are not made in assertion or pursuance of a right to support, and that although they are often undertaken for the convenience of one or other, they are entirely free from obligation on either side. A man goes abroad for six months on business or pleasure; his wife discharges the servants, locks up the house, and goes with her baby to her father's home. Her visit costs the father something, and saves the husband much; but she is no less dependent on the latter's income than before he went away. I cannot distinguish the case I have suggested from that of poor Mrs. Queen. Her need no doubt was more pressing, and her father's kindness a greater help, but in each instance it was kindness and nothing more.

Before I close I desire to say a few words as to the nature of this appeal. We have only jurisdiction to hear an appeal on a question of law, and it may be thought that whether a wife is dependent wholly or in part on her husband's earnings is more a matter of fact than law. This sometimes may be so, but it is not in the present case. We have here certain admitted facts, the legal consequence of which is that the claimants are either wholly dependent or are not; and the proper conclusion to be drawn from them is a pure question of law. We have, if I remember aright, on one or two former occasions set aside an apparent finding of fact in claims under the Act of 1897, on the ground that there was no evidence to support them. Here I hold that the evidence can legally lead to only one conclusion.

There is a precise precedent for this in the Scotch claim of *Cunningham* v. *M'Gregor & Co.* (1), approved of by the English Court of Appeal. There the sheriff found that the wife was dependent only in part, but the Court declared her wholly dependent, and sent back the case to have compensation awarded on this basis. The Recorder, in consequence of what was said by counsel, did not decide the point now in controversy at all, but we have sufficient materials before us to enable us to rule it as a matter of law, and I have dealt with it accordingly.

(1) 3 F. 774.

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I have not thought it necessary to refer to Lord Campbell's Act, or the action for *solatium* known to Scottish law, which were not relied on by counsel. We must have recourse thereto to ascertain the persons who may be entitled to compensation, but they throw no light on the words "dependent wholly or in part on the earnings of the husband." There is no doubt that a daughter, whether married or not, may be wholly or in part dependent on her father; but I am of opinion that the undisputed facts of this case do not justify this inference.

Solicitor for the applicant: *J. H. Callan.*
Solicitor for the respondent: *John Walker.*

R. D. M.

K. B. Div. 1905. April 26, 27. May 3.

THE KING (CONWAY AND OTHERS) *v.* THE JUSTICES OF THE COUNTY TYRONE (1).

Practice—Order of Justices—Appeal—Petty Sessions District in two Quarter Sessions Divisions—Dismiss on the merits—Reversal on appeal—No express adjudication of guilt—5 & 6 Vict. c. 106, s. 78—14 & 15 Vict. c. 93, s. 24—40 & 41 Vict. c. 56, s. 74.

Where a Petty Sessions District is in two Quarter Sessions Divisions, the Quarter Sessions Division in which the Petty Sessions Courthouse is situate is the Division to which an appeal should be taken, under sect. 24 of the Petty Sessions Act, 1851, notwithstanding that the offence was committed in the other Quarter Sessions Division.

On appeal to Quarter Sessions from an order dismissing a complaint on the merits, the order of the Chairman and Justices was—"that the dismiss on the merits be reversed," and that a certain fine and costs should be paid by the defendant:—

Held, that although the Quarter Sessions did not in express words adjudicate the defendant guilty of the offence, the order was good as an adjudication of guilt, under sect. 24 (6) of the Petty Sessions Act, 1851.

MOTION to make absolute a conditional order of *certiorari* to bring up to be quashed an order of the Chairman and Justices of

(1) Before LORD O'BRIEN, L.C.J., and ANDREWS and GIBSON, JJ.

the County Tyrone, at Omagh, reversing, on appeal, a dismiss on the merits made at Gortin Petty Sessions. Charles Conway, John Carlin, Michael Carlin, and John M'Donnell were summoned to appear at Gortin Petty Sessions on the 6th January, 1905, to answer the complaint of John Patterson, fishery inspector, that between sunset and sunrise at Clogherney, in the same Petty Sessions District, they had a lyster in their possession on the banks of the river Glenby, contrary to the fishery laws. The Justices present, by a majority, dismissed the complaint on the merits. An appeal was taken by Patterson. Gortin Petty Sessions District was in two Quarter Sessions Divisions; the townland in which the offence was alleged to have been committed, and where all the defendants resided, was situate in the Strabane Division; but Gortin Petty Sessions courthouse, where the complaint was originally heard and the remainder of Gortin Petty Sessions District were in Omagh Division. Notice of appeal was served for, and the appeal was prosecuted before, the Chairman and Justices sitting at Omagh Quarter Sessions; and upon rehearing of the evidence, the Chairman and Justices, on the 23rd January, 1905, made the following order:—"That the dismiss on the merits be reversed, and that the defendants be ordered to pay a fine of £2 each, with 10*s.* 6*d.* costs of appeal, and in default of payment be imprisoned in Londonderry gaol for one calendar month, one-third of the fine to the complainant, and two-thirds to the conservators; the lysters to be forfeited." It was now sought to quash this order upon the grounds that the appeal should have been prosecuted before the Chairman and Justices sitting at Strabane Quarter Sessions, and not at Omagh; and that the order was bad on its face, in that it contained no adjudication upon any offence, and made no conviction in respect of any charge.

By way of cause, John Patterson, the complainant, submitted that by virtue of section 74 of the 40 & 41 Vict. c. 56, and section 24 of the 14 & 15 Vict. c. 93, the proper Quarter Sessions to hear the appeal was the Quarter Sessions at Omagh.

Muldoon, for the prosecutor, in support of the conditional order.

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THE KING (CONWAY) v. JUSTICES OF TYRONE.

Horner, K.C., and *Charles Brady*, for John Patterson, the complainant below.

[The following cases were cited—*Ex parte M'Fadden* (1); *R.* v. *Daman* (2); *R.* v. *Harris* (3); *R.* v. *Jefferies* (4); *R.* v. *Horgan* (5); *R.* (*Cahill*) v. *Justices of Dublin* (6); *R.* v. *Dillon* (7); *R.* (*Sheehan*) v. *Justices of Tipperary* (8); *R.* (*M'Ardle*) v. *Justices of Louth* (9).]

May 3.

LORD O'BRIEN, L.C.J.:—

The facts of the case are very few. It appears that a summons was served on the defendant, Charles Conway, and three others, complaining that on Monday, the 19th December, 1904, between sunset on Monday, the 19th December, and sunrise on Tuesday, the 20th December, 1904, in or on the banks of the river Glenby, in the townland of Clogherney, in the county Tyrone, the defendants, and each of them, had a lyster in their possession with intent to take salmon contrary to the statute. The magistrates who heard the case at Petty Sessions made an order to the following effect:—"That the complaint be dismissed on the merits." The case came before the Quarter Sessions at Omagh on appeal on the 23rd January, 1905, and the Court of Quarter Sessions ordered "That the dismiss on the merits be reversed, and that the defendants be ordered to pay a fine of £2 each, with 10*s.* 6*d.* costs of appeal, and in default of payment be imprisoned in Londonderry gaol for one calendar month, one-third of the fine to be paid to the complainant, and two-thirds to the conservators; the lysters to be forfeited."

A conditional order for a *certiorari* was granted to quash the order of the Quarter Sessions. Two objections have been made. The first is that the Omagh Quarter Sessions was not the proper Division for the hearing of the appeal. It is said that inasmuch as the offence was committed in the Strabane Division, the appeal should have been carried to the Strabane Quarter Sessions. Secondly, it is said that the Quarter Sessions order is bad on

(1) Judgments of Sup. Cts., 165.
(2) 1 Chit. 147.
(3) 7 T. R. 238.
(4) 4 T. R. 767.
(5) 2 Cr. & D. 63.
(6) [1904] 2 I. R. 698.
(7) Judgments of Sup. Cts., 183.
(8) 37 Ir. L. T. R. 48.
(9) [1904] 2 I. R. 64.

its face, inasmuch as it does not purport to convict—to make an adjudication of guilt. As to the first objection, I am of opinion that that is met by the admission that the magistrates sitting in Petty Sessions at Gortin, in the Division of Omagh, was the proper forum to hear the case—that is, the proper primary tribunal. The Petty Sessions District of Gortin is partly in the Division of Strabane and partly in the Division of Omagh. No doubt the offence was committed within the Quarter Sessions Division of Strabane, but it is admitted, as I have said, that the proper primary forum was at Gortin, and that that is within the Quarter Sessions Division of Omagh. In my opinion the determining factor is not the place where the offence was committed, but the place where it was properly originally triable by the magistrates at Petty Sessions. This, even irrespectively of the 5 & 6 Vict. c. 106, under which the prosecution was instituted, is manifest from the 24th section of the Petty Sessions Act. That section provides in so many words that the person against whom the order of the Justices is made is entitled to appeal—to what? To the next Quarter Sessions to be held in the same Division of the county, when the order shall be made by any Justice or Justices of any Petty Sessions. "Same Division of the county" was clearly the Division in which the case was properly heard before the primary tribunal, though the offence was not committed there—that is to say, the Omagh Division, where the case was in fact heard. That disposes of the first objection.

I come now to deal with the second objection, that the order of the Quarter Sessions is bad, because it does not expressly purport to convict—that is to say, expressly adjudicate that the defendants were guilty. The order is that the "dismiss on the merits be reversed, and that the defendants be ordered to pay a fine and costs." If Baron Parke had not been dead but sleeping and woke up to hear Mr. Muldoon so ably and earnestly arguing in this narrow circle of technicality, the heart of that great judicial champion of formality would have indeed rejoiced. But the age of mere technicality is passed. The latter-day administration of our law protests against that slavish adherence to mere forms, which, in my opinion, often proved the opprobrium of our Courts. At the same time, I am far from saying that it is

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Lord O'Brien, L.C.J.

always easy to distinguish between what is a matter of substance and what is a matter of form, but when an order plainly imports an adjudication of guilt, as the order before us does, it would, I think, be really pitiful if we were compelled to quash it, because it does not in so many words state what it so manifestly imports—and this, too, in a case brought under the Petty Sessions Act, which says that it shall be sufficient to enter the substance of each order in the Petty Sessions Book, and which further provides, that in case of appeal to the Court of Quarter Sessions, that Court may "confirm," "vary," or "reverse" the order of Petty Sessions. In the order before us we have not only the word "reversed," but we have the imposition of a fine, a direction for the payment of costs, and, in default, a term of imprisonment, and also a declaration that the lysters shall be forfeited. What does all this show? Manifestly a conviction, an adjudication of guilt.

Upon the two points which were argued we must decide against Mr. Muldoon, and discharge the conditional order, with costs.

ANDREWS, J.:—

Upon the first objection to the order in this case of the Court of Quarter Sessions, dated the 23rd January, 1905, that the appeal on which it was made should have been taken to the Quarter Sessions held at Strabane, and not to the Quarter Sessions held at Omagh (at which it was heard and determined), I am of opinion that the appeal was rightly taken to and heard and determined at the Omagh Quarter Sessions.

The appeal was against an order made by the Justices sitting at Petty Sessions at Gortin in the Petty Sessions district of Gortin, in the county Tyrone. This district is situated partly in the Quarter Sessions Division of Omagh, and partly in the Quarter Sessions Division of Strabane. Gortin, at which the Petty Sessions are held for the Gortin district, is within the Quarter Sessions Division of Omagh. The order so made at Petty Sessions was an order dismissing on the merits a complaint that each of the defendants had between sunset and sunrise, in the townland of Clogherney, a lyster in his possession with intent to take salmon in or on the banks of the river Glenby, in that townland, contrary to the provisions of

the 78th section of the 5 & 6 Vict. c. 106. The place where the offence was committed is in the Quarter Sessions Division of Strabane. The 99th section of the 5 & 6 Vict. c. 106 enacted that if any person should think himself aggrieved by any judgment, order, or conviction, of any Justice or Justices of the Peace, he might appeal to the next general Quarter Sessions to be held in the division of the county (or for the city or place) *where such judgment, order, or conviction, should have been made or had.*

The 74th section of the 40 & 41 Vict. c. 56 enacted that if any Justice or Justices should thereafter dismiss any complaint made under the 5 & 6 Vict. c. 106, any person aggrieved thereby might appeal against such order, and the provisions of the 24th section of the Petty Sessions (Ireland) Act, 1851 (as amended by the Act of the 40 & 41 Vict.), should extend, and might be applied to such appeal. This regulated the *procedure* of such appeals, and under the 24th section of the Petty Sessions Act, in a case like the present, the person against whom the order of the Justices was made was entitled to appeal "to the next Quarter Sessions, to be held in *the same division* of the county where the order shall have been made by any Justice or Justices of any Petty Sessions district." Irrespective of the 99th section of the 5 & 6 Vict. c. 106, I would be of opinion, but, having regard to that section, I think it clear, that the words "the same division of the county" in the 24th section refer to the division of the county in which the order was made; and in this case the order having been made in the Omagh Division of the county, the appeal was rightly brought to the Omagh Quarter Sessions.

As regards the further and only other objection to the order of the Court of Quarter Sessions made on the appeal so taken, namely, that it is bad on its face for not showing any adjudication of guilt against the defendants, I think we must, in the absence of evidence to the contrary, take this order to have been in the very terms certified by the Deputy-Clerk of the Peace on the Appeal Form H which is prescribed by sub-section (3) of the 24th section of the Petty Sessions Acts. The 6th sub-section of that section empowers the Court of Quarter Sessions to entertain the appeal, and *confirm*, *vary*, or *reverse* the order appealed against; and the 6th sub-section directs that when the appeal shall have

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been decided, the Clerk of the Peace, or other proper officer, shall certify such decision at foot of the form of appeal, and return the same and the appeal proceedings to the Justices of the Petty Sessions at which the order appealed against shall have been made.

The order made by the Court of Quarter Sessions on the 23rd January, 1905, on the appeal in this case, as certified in pursuance of the 6th sub-section of the 24th section of the Petty Sessions Act, is "that the dismiss on the merits be *reversed*, and that the defendants be ordered to pay a fine of £2 each," with a sum for costs, and with provisions in default of payment. The Court of Quarter Sessions, it will be observed, is empowered, on hearing the appeal, to *confirm*, *vary*, or *reverse* the order appealed against. I think each of these three words has a separate and appropriate meaning. "Confirm" requires no explanation; "vary," in my opinion, means *alter in part*, as distinguished from discharging the entire order appealed against, and making a wholly different one; and "reverse," in my opinion, imports more than *discharge*, and means "*changed to the contrary.*" In the Imperial Dictionary and other reliable dictionaries one of the meanings given of the word "reversed" is "changed to the contrary." I think the order referred to by the word "reverse" in the 6th sub-section was an order not merely discharging the order appealed against, but changing it to an order to the contrary, and that the true construction of the word "reversed" in the Quarter Sessions order, as applied to the dismiss on the merits thereby stated to be *reversed*, is that the dismiss on the merits was discharged and changed to an order to the contrary, which, in my opinion, is an order of conviction, the dismiss on the merits having been in effect an acquittal. The words of the order which follow, imposing the fine, in my opinion, strongly support this construction.

Therefore, as the word "reversed" in the Quarter Sessions order, in my opinion, imports a *conviction*, the objection to the order, founded on the absence from it of an adjudication of guilt, fails, and the result is that the motion for a *certiorari* to quash the Quarter Sessions order ought to be refused, and the conditional order for the issue of a writ of *certiorari* discharged, with costs.

GIBSON, J. :—

Two objections are advanced against the conviction—(1) the appeal should have been to the Strabane Quarter Sessions, and the Omagh Quarter Sessions acted without jurisdiction; (2) the order is bad on its face, because (it is argued), though there is punishment awarded, there is no express conviction. For the prosecutor below, Mr. Horner, K.C., contested both propositions, and, in addition, contended that the Sessions order entered in the Crown Book was not subject to *certiorari*, because it was a mere minute, and not a formal record.

1. The appeal must be to the next Quarter Sessions to be held in the same division of the county, that is, to the Sessions held next in time after the order below, where there are more Quarter Sessions towns than one in the division: *Reg.* v. *Armagh Justices* (1). The Petty Sessions District, though composed of portions of separate divisions, is one integer, and its courthouse determines the appeal forum. The appeal is governed by the place of decision below, not by the locality of the offence. If it were otherwise, decisions given on the same day by the same Petty Sessions Court might go before different appeal Courts, according as the offences were committed in one or other of the divisions composing the Petty Sessions District. The decision of the Justices was given in the courthouse situate in the Omagh division, and the appeal was rightly disposed of by the Omagh Sessions.

2. As to the form of the order: no doubt before the Petty Sessions Act it was necessary to draw up a formal conviction, as to which there was, on the one hand, an extremely strict principle of construction—*Day* v. *King* (2); and, on the other hand, there were wide powers of correction—*Ex parte Johnson* (3)—which power this Court has recently held to be no longer applicable in Ireland. The Petty Sessions Act substitutes a simple form of record in the Court Book, and, as a general rule, when the form therein prescribed is followed, that is sufficient, though in some cases it may be otherwise, as, for example, when the complaint is determinable out of Petty Sessions under the Act (sect. 8, sub-sect. 2).

(1) [1895] 2 I. R. 503. (2) 5 A. & E. 359. (3) 3 B. & S. at p. 952.

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There the inability of the defendant to give bail is a condition to jurisdiction. Even in that case Hayes, J., though holding that on the return the condition must appear to be satisfied, was of opinion that such condition need not appear in the Order Book: *Reg.* v. *County Dublin Justices* (1). If the order before us, as entered at Quarter Sessions, had been made at Petty Sessions, it would have been good. It necessarily involves a conviction. The form is quite a common one, and its sufficiency at Petty Sessions has never been questioned. There have been several cases where (as here) there was no express conviction, and the order imposing punishment was held sufficient: *e.g. Reg.* v. *County Dublin Justices* (2); *Reg.* v. *Mayor of Clonmel* (3). In civil complaint cases for debt or otherwise, the order directing payment is obviously good, without any separate declaration that the cause of the complaint is established.

If an order in this form would have been valid below, does a different principle apply to the Quarter Sessions on appeal? If the Sessions had affirmed a conviction drawn up in this form below, and such form was in the Court below sufficient, it is hard to say that the appeal affirmance would have been vitiated by reason of the absence of the technical language necessary to support an English conviction. The Petty Sessions procedure is recognised in the 24th section, and the certificate of the Sessions Order which is to be transmitted back to the inferior tribunal to be carried out is obviously a compendious form of the Petty Sessions type.

Taking the Petty Sessions form, sect. 24, and the certificate together, I am of opinion that the order is good; and my opinion would be the same if the word "reversed" was not used, but "appeal allowed," or some other equivalent expression was employed. It is admitted that the entry in the Crown Book corresponds with the certificate.

3. The last point discussed, namely, that the entry in the Crown Book is not a record to which *certiorari* applies, is founded on a misconception. In England a formal conviction may be drawn up at any time before the return of the *certiorari*, from which it seems to follow that the conditional order for *certiorari* may be made absolute notwithstanding that the final and formal record has not

(1) 13 Ir. C. L. R. at p. 387. (2) 18 L. R. Ir. 106. (3) 9 Ir. C. L. R. 267.

been made up: *Ex parte Johnson* (1). In this country, since the Petty Sessions Act, the entry in the Crown Book, as certified at the foot of Form H, under sect. 24, sub-sect. 6, has always been treated as a record allowing *certiorari*. The certificate relates to an order already complete, and it may be doubted whether, after a certificate has been issued and transmitted for execution, it would be possible to make a change in the form of the original order which would be inconsistent with such certificate. The point has never arisen. If the order entered in the Court Book corresponding with the certificate was invalid as showing no conviction, or for some other reason, I should decide that it was a record which could be quashed in *certiorari*. The point does not require decision, as the order here was good on its face. I only notice it, lest I should be supposed to agree with Mr. Horner's contention.

Solicitor for the prosecutor: *F. J. O'Connor.*
Solicitors for the complainant: *Tillie & M'Dermott.*

J. L.

THE KING (MADDEN AND ANOTHER) *v.* THE JUSTICES OF THE COUNTY ROSCOMMON (2).

Local government—Board of guardians—Seed potatoes—Guardian concerned in contract for repayment—Disqualification—Schedule to Local Government (Application of Enactments) Order, 1898, *art.* 12—*Seed Supply Act*, 1898 (61 & 62 *Vict. c.* 50).

A poor law guardian, who, in common with the other occupiers under a certain valuation, receives seed potatoes from the guardians under a promise to pay for them a specified price, is, so long as the price remains unpaid, concerned in a contract with the guardians, within the meaning of article 12 (4 e) of the Schedule to the Privy Council (Application of Enactments) Order of the 22nd December, 1898.

CERTIORARI.

Application to bring up to be quashed three orders of the

(1) 3 B. & S. at p. 952.
(2) Before LORD O'BRIEN, L.C.J., and WRIGHT, J.

K. B. Div. 1905.

THE KING (MADDEN) *v.* JUSTICES OF ROSCOMMON.

Justices at Boyle Petty Sessions, dated the 13th September, 1905, whereby Thomas Madden was convicted on two distinct summonses, and Dominick Brennan on one summons, on the complaint of Daniel Moore that they, being disqualified for acting as members of the Boyle Board of Guardians under article 12 (4 *e*) of the Schedule to the Privy Council (Application of Enactments) Order of the 22nd December, 1898, by reason of their being concerned in a bargain or contract with the Board, to wit, a bargain or contract entered into by them with the Board for the purchase of seed potatoes, the defendants acted and voted as members of the Board when disqualified by reason of the existence and continuance of the bargain or contract, and thereby incurred the penalty provided by article 12 (11) of the order. The impugned orders of the Justices convicted the defendants, and ordered them to pay in each case a fine of 6*d.*, with 2*s.* 6*d.* costs, and in default of payment, seven days' imprisonment in Sligo gaol, without hard labour, unless the fines were sooner paid. The offences of Thomas Madden were alleged to have been committed, respectively, on the 13th May and 17th June, 1905, and the single offence of Dominick Brennan on the 17th June, 1905. Conditional orders to quash these convictions were obtained upon the grounds that the magistrates acted without, and in excess of, jurisdiction in convicting the defendants—(1) there being no evidence, and (2) there being insufficient evidence (*a*) that the accused were disqualified by reason of being concerned in contracts with the Boyle Board of Guardians, and (*b*) that the accused acted while so disqualified.

The principal evidence given in support of the complaint before the magistrates was that of James Cox, clerk of the Boyle Union, who having proved that the defendants were guardians on the respective dates, produced the minute books to show that they were present at the Board meetings and participated in the proceedings on those dates. The witness also gave evidence that, acting on the authority of a circular issued by the Local Government Board on 13th December, 1904, which promised that an Act of Parliament would be subsequently obtained for the purpose of legalizing the proceedings, the Boyle Guardians, by means of a loan of £1250, purchased seed potatoes for sale to occupiers of holdings under £15 valuation. All who applied, who came within

the description in the circular, were entitled to get seed, and were given seed. There was no selection by the guardians of the persons once they came within the description, and the price was automatically fixed at the cost price of the seed plus the expenses. Madden got 2 cwt. of Champions and 2 cwt. of Northern Star seed at £1 11*s.*, and Brennan got 2 cwt. of Champions at 11*s.* 10*d.* All the seed was given about the 15th March, 1905. Each of the defendants signed the following form of contract:—

FORM L 1.

SEED POTATOES SUPPLY.

BOYLE UNION.

Rushfield Electoral Division.

Number in Rate Book.	Townland.	Valuation.	Name of Occupier.
		£ *s.* *d.*	
412	Knockra.	14 0 0	Thomas Madden.

I, being the occupier of the above described holding, do hereby acknowledge that I have received from the guardians of Boyle Union 4 cwt. of Seed Potatoes (2 of "Champions" and 2 of "Northern Star"), for which I promise to pay the said guardians the sum of £1 11*s.* 0*d.*

Dated this 15th day of March, 1905.

THOMAS MADDEN, *Occupier.*

J. COX, *Witness of delivering.*

WM. ODBERT, *Clerk of Union.*

The witness also gave evidence that the procedure followed throughout was the procedure laid down by the Seed Act, 1898, and that the repayment was in all cases to be by two instalments of seed rate to be applotted, levied, and collected by the county council, the board of guardians merely furnishing the county council with the particulars of the amounts due. The rate was to be of the same character, and levied and collected in the same way, and with the same incidents, as poor rate. On these allegations counsel on behalf of the defendants contended that there was no evidence that the accused were, or that either of them was,

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disqualified; and, secondly, that there was no evidence that the accused, or either of them, had acted or voted when disqualified. As to the first objection, it was submitted that inasmuch as no Act of Parliament had been obtained to legalize the circular of the Local Government Board, or the proceedings taken thereunder by the Board of Guardians, and as the Seed Act of 1898 was limited in its operation to the years 1898 and 1899, there was—(1) no contract with the accused, (2) no contract enforceable by law, (3) no contract within the contemplation of article 12 (4*e*) of the Application of Enactments Order. It was also submitted that, whether there had originally been a contract or not, the accused, at the time of the meetings mentioned in the summonses, were, so far as the transaction was concerned, merely in the position of ratepayers, liable to pay to the county council a seed rate similar in its character and incidents to the poor rate. Counsel also relied on the Seed Act, 1898, as showing that it was the intention of the Legislature that the purchasers of seed should not be disqualified. As to the second objection, it was submitted that the mere presence at the meetings of the accused was not evidence of their having acted or voted.

The magistrates overruled both objections, holding (1) that there was a contract within the contemplation of article 12 (4*e*) of the Application of Enactments Order, and (2) that there was evidence that the accused had acted when disqualified. They thereupon convicted both the accused, and imposed a fine of sixpence on each.

A cause affidavit filed by the complainant stated that the Seed Act, 1898, was not limited in its operation to the years 1898 and 1899. Section 1 (2) provided that the expenses of execution should be defrayed by the electoral division out of the poor rate until 31st March, 1899, and afterwards by the union. It was submitted that the circular of the Local Government Board, and the proceedings thereunder by the guardians, were perfectly legal, and that a good enforceable bargain or contract was made with the Boyle Board of Guardians by each of the defendants, and that the convictions were right.

S. L. Brown, K.C., and *William M'Grath*, for the prosecutor:—

In order to bring the contract within the article, there must be a conflict between interest and duty, and here there is no such conflict: *Nutton* v. *Wilson* (1); *Towsey* v. *White* (2). If there had been any profit here, it would have been a profit earned by the board of guardians. There is no case in which disqualification was held to arise in respect of a contract yielding a profit to a public body, as distinguished from a member of the public body. No disqualification arises in the case of contracts when Parliament has given a local body power to sell something or do some work for the benefit of the community. If such disqualification did exist, it would apply to every case in which a private individual entered into a contract with the local body for a special supply of gas, water, or electricity. Under the Local Government Board circular and advertisements, it was a condition that the repayments should be made by means of a rate, and the contract must be read in that sense: *Connolly* v. *Fitzgerald* (3).

Healy, K.C., and *T. Sullivan*, for the defendants:—

The defendants entered into a binding contract to pay a specified sum for value they received in seed potatoes. That contract is none the less binding by reason of any illegality there may have been either on the part of the Local Government Board or the board of guardians: *Donovan* v. *South Dublin Guardians* (4). As long as the price agreed upon was unpaid each of the defendants was concerned in a contract with the guardians within the meaning of article 12 (4*e*). The contract is both within the mischief aimed at by, and within the letter of, the article.

LORD O'BRIEN, L.C.J.:—

The contract in this case is as follows:—"I" (meaning the defendant), "being the occupier of the above-described holding, do hereby acknowledge that I have received from the Guardians of the Boyle Union 4 cwt. of seed potatoes (2 of the Champions, and 2 of the Northern Star), for which I promise to pay the said

(1) 22 Q. B. D. 744.
(2) 5 B. & C. 125.
(3) Unreported.
(4) 5 New Ir. Jur. Rep. 106.

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guardians the sum of £1 11*s*." That is a very intelligible contract. It is not a provision for payment by a rate. It is simply a personal contract involving personal liability to pay the said guardians the sum of £1 11*s*. for potatoes received, and I think it is deliberately made in that form. I do not care to speculate as to what might take place as to merger in the event of the proposed Act of Parliament being passed. We showed in *O'Carroll* v. *Hastings* (1) that in *Connolly* v. *Fitzgerald* (2), which was referred to, the contract there had merged in an award, and that the latter case was accordingly not within the section. But there is no question of merger in this case. The contemplated Act of Parliament was not passed, and I do not know when it may be passed, if ever. The contract here undoubtedly exists, and the question we have to consider is, is the defendant *concerned* in that contract? "Concerned" is the term employed by the Legislature as being the most comprehensive term that could be used; it was intended, in my opinion, to comprise all dealings between a member of a local body with the local body itself, and once a member was "concerned," to render unnecessary all investigation as to how his being "concerned" might operate. It appears to me the defendant is concerned in the contract, because there is, under the contract, a direct liability on his part to pay, and if there is a direct liability to pay, it is hard to say that he is not "concerned" in the contract. The defendant contracts that, in consideration of his having received certain seed potatoes, he will pay the guardians a certain contract price. Saying that the true position is the relation merely of debtor and creditor, and that once that relation exists the case is not within the section, is, in my opinion, simply to ignore the language of the section. Surely, though the relation of debtor and creditor may exist, the contract which fixes the contract price cannot be laid aside, and it must be remembered that the defendant would be estopped by his signature to the contract from denying that the guardians had power to make it. The defendant got the seed potatoes by virtue of his undertaking to pay—an undertaking not yet discharged by him, but enforceable under his contract against him. He, an individual guardian, received from the body of the

(1) [1905] 2 I. R. 590. (2) Unreported.

guardians seed potatoes, portion of a fund intended for distribution among a very poor class of landowners by the body of the guardians, and he entered into a contract with his brother guardians —with the body of the guardians—to pay for them. I think the section aimed, amongst other things, at this description of dealing. It is said that contracts of this character are not within the "spirit" of the section, though, as has been admitted, they are within its language. Pursuing the spirit of an Act of Parliament whilst you ignore its language is a very precarious proceeding, which receives no favour from the law. It seems to me that the contract is not alone within the language of the section, but is also within what is said to be its spirit, if I may use the vague term that has been employed. What is said to be the policy or object of the section? To preserve and enforce purity in local bodies—to prevent favouritism and truck between the members of these bodies. I think if this were to be allowed, they would have a power of selection which it was never intended to give them. In fact, an individual guardian, with the assistance of his brother guardians, might help himself. If ten or twenty applicants for seed potatoes came simultaneously, and there was, from any cause, a deficient supply, I venture to say that the guardians would readily recognise the familiar features of a brother guardian, and would be much tempted to give him preference. Is it to be contended that, if any question arose as to enforcing payment of the contract price, the defendant could vote in respect of it?

However, I do not desire to embark upon any close inquiry as to what was the "spirit" of the Act of Parliament. The language of the section is plain, and the defendant is, in my opinion, obnoxious to it.

WRIGHT, J.:—

I concur. I have no doubt that at one time it was intended to apply for an Act of Parliament, but that intention never came to anything. Whether an Act will ever be applied for now, or in what shape it may pass, I do not know. All that is matter of the merest speculation. I have to consider what are the rights and liabilities, under the contract, of the parties who got these seed potatoes. These matters are to be deduced from the terms of the

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short and simple document itself, and without importing into it any matters that may or may not hereafter come into existence. The document is an unconditional promise to pay, upon which the man who signed it could, in my opinion, be sued the next day. *Connolly* v. *Fitzgerald* (1) has been clearly distinguished. There the contract had been superseded by the award, and was at an end. Here there is still the liability to pay; and as long as that remains, the contractor is concerned in the contract.

I am, therefore, of opinion that the contract is a contract subsisting between the parties, and it comes within the letter of this article 12, sub-article 4 (*e*). Does it come within the mischief aimed at? In my opinion, it certainly does; and if boards of guardians seek to relieve distress by borrowing money, I think an individual guardian must elect whether he will act as a public man or be an applicant for relief.

Solicitor for the prosecutor: *P. J. O'Farrell.*
Solicitor for the complainant: *W. J. Robinson.*

J. L.

(1) Unreported.

M'BRIDE, APPELLANT; M'GOVERN, RESPONDENT (1).

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Cart—Name and residence of owner painted in Irish letters—Summary Jurisdiction (Ireland) Act, 1851 (14 & 15 *Vict. c.* 92), *section* 12, *sub-section* 1.

Section 12, sub-section 1, of the Summary Jurisdiction (Ireland) Act, 1851, imposes a penalty on the owner of a cart, &c., who uses it on a public road without having his name and residence painted upon some conspicuous part of the off-side in legible letters of the dimensions and colour therein mentioned :—

Held, that, on the true construction of the sub-section, the "legible letters" therein referred to are such legible English letters as are now in use, and that the provision is not complied with by painting the name and residence of the owner on the cart in Irish letters.

CASE STATED under 20 & 21 Vict. c. 43.

The following are the material facts as set out in the case :—

At a Petty Sessions held for the Petty Sessions District of Dunfanaghy, county Donegal, the appellant, Neil M'Bride, was charged on summons, on the complaint of the respondent, Hugh M'Govern, head-constable, Royal Irish Constabulary, with having had on the public road at Kill, in the said district, a cart for the conveyance of goods, of which cart he was the owner, without having his name and residence painted thereon in legible letters as required by 14 & 15 Vict. c. 92, s. 12. At the hearing of the complaint it was proved, on the part of the complainant, that the appellant had on the public road at Kill, on the day charged in the summons, a cart for the conveyance of goods, of which cart the appellant was owner, and that the name and residence of the appellant were not painted on the cart in letters legible to complainant (*i.e.* in English characters), but were painted in letters

(1) Before LORD O'BRIEN, L.C.J., and ANDREWS and GIBSON, JJ.

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believed to be Irish (1). It was admitted that the letters were of the proper dimensions, and that they might be legible to people who could read the Irish language.

It was proved, on the part of the appellant, that the name and residence of the appellant were correctly painted on his cart in legible letters and characters of the Irish language, and that in the district in question the Irish language was spoken by three-fourths of the population, of whom a large proportion spoke both Irish and English, while a considerable number spoke Irish exclusively; and that in several of the National schools of the district the reading and writing, as well as speaking, of the Irish language were taught as an extra subject, and paid for by the Commissioners of National Education after examinations conducted in Irish by the Commissioners' inspectors. That there were several branches of the Gaelic League established in the district, in connexion with which the reading and writing and speaking of the Irish language were also taught, and that in some instances private tuition in the reading, writing, and speaking of the Irish language was also given; that letters and packets and parcels addressed exclusively in Irish were carried and delivered by the post in the district; that literary and educational works in the Irish language were read in the district; and that several newspapers containing printed matter in the Irish language circulated in the district, some of such matter being contributed from the said district.

The Justices being of opinion that the name and residence of the appellant, being painted in Irish letters, were not in legible letters according to the Act, convicted the appellant; but at his request stated the present case, the question being whether the Justices were correct in point of law in their determination.

(1) The name and residence were painted on the cart in the following characters:—

mıall mac ɡıolla bɾıɡde,
fıoḋ-móɾ.

The corresponding letters in the English character would be:—

NIALL MAC GIOLLA BHRIGHDE,
FIODH-MOR.

P. S. Walsh (with him *Healy, K.C.*, and *Pearse*), for the appellant:—

The name and residence of the owner were painted on the cart in legible letters. "Legible" is defined in Webster's Dictionary as "capable of being read; consisting of letters or figures that may be distinguished by the eye." We submit, first, that the meaning of the word "legible" in sub-sect. 1 of section 12 of 14 & 15 Vict. c. 92, is that the letters must not be obliterated or defaced. This construction is borne out by the expression in sub-sect. 5, "remaining legible." So in 16 & 17 Vict. c. 112, s. 18, the words "visible and legible" are used in contradistinction to "obliterated and defaced." The painting, therefore, of the name in Irish letters is, we submit, sufficient, so long as the letters are not obliterated or defaced. The object of the sub-section is the identification of the owner of the carts, and this is sufficiently secured by the name being in Irish characters, especially in a district, such as this, where Irish is largely spoken, and publications in the Irish character are widely circulated. Persons not able to read Irish could, by inquiring, readily ascertain the owner of the cart. There is no statute prohibiting the use of Irish letters. [He referred to 5 Edw. 4, c. 3 (Ir.); 17 & 18 Car. 2, c. 2 (Ir.), s. 234; 11 Geo. 2, c. 6 (Ir.).]

Secondly, even assuming that the name and residence must be in English letters, the letters used here are not so exclusively Irish as not to be also English. The only letter which materially differs from the corresponding English character is the letter 'g,' and in point of fact, although it differs from the present English form, it corresponds with the old English form of that letter.

Cecil Atkinson, for the respondent:—

The statute in question was passed by an English-speaking Parliament, legislating in the English language, and the presumption is that it was intended that the name and residence should be in the English language and in English characters. The Irish language has never been officially recognized in this country. Words in an Act of Parliament are to be construed according to their ordinary meaning in the English language (per

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Lord Esher, M.R., in *Clerical, Medical, and General Life Assurance Society* v. *Carter* (1)). The object of the Act is to enable any person injured by the cart to ascertain the name and address of the owner; and this object would be, to a great extent, defeated if Irish letters could be used.

Pearse, in reply :—

The statute is one applying to a bi-lingual country, and, therefore, there is no presumption that it is intended that the name must be in English characters.

Cur. adv. vult.

May 18.

Lord O'Brien, L.C.J. :—

This case has been most elaborately and interestingly argued by Mr. Walsh and Mr. Pearse on behalf of the defendant. They said everything that could, with propriety, be advanced on behalf of their client, but the result was never far to seek. The case is very short in the way of statement, and is, I think, obvious as regards conclusion. The question is this. The defendant, whose name in English is the well-known name of M'Bride, and whose name in Irish I will not venture to pronounce lest my faulty pronunciation might shock the many Irish scholars who take an interest in the case, was summoned under the provisions of the Summary Jurisdiction Act for not having his name painted on his cart in legible letters. His name was painted in Irish characters, not in English. The question is, was the fact they were painted in Irish letters a compliance with the Act of Parliament. The statute enacts that they shall be painted in legible letters of certain prescribed dimensions. In my opinion, the solution of the controversy depends not on the word "legible," but upon the word "letters." What is meant by the word "letters" in the statute? No doubt the letters in question were of the prescribed dimensions and were distinctly painted, and could be easily read by an Irish scholar, by

(1) 22 Q. B. D. at p. 448.

a person who could read the Irish language; but the character, the type, was Irish, and, in our opinion, this fact that the character, that the type, was not English, made the defendant amenable to the provisions of the statute. The characters were not the characters of the language which the Crown and Legislature recognise as the language of the United Kingdom for all legal and official and public purposes. Parliament conducts its debates in English, and legislates in English. The enacting body expresses itself, and the enactment which contains the relevant provision is expressed, in English. English is the language of the Crown; of, as I have said, the Legislature both in debate and enactment; of all the Government administrative and public departments; of the Courts; of the Supreme Court; and of the Courts of Summary Jurisdiction, where the very offence under consideration is to be investigated; and, in the eye of the law, of the constabulary who, under the 14th section of the Act, are to take cognizance of the offence. I say, in the eye of the law, of the constabulary, because, whilst a knowledge of English is prescribed as a necessary condition for admission to the force, there is no provision as to a knowledge of Irish. It should be remembered, too, that the provision was made for the benefit of all the English-speaking subjects of the Crown, no matter whether Irishmen or Englishmen, no matter whether resident in Ireland or casual visitors who might be travelling in Ireland. And certainly Irish characters would afford no information whatever to a person who spoke English exclusively, so as to enable him to identify an offender who had been guilty of an offence on the public roads. I referred to the 3rd sub-section of section 11, which provides that the omission to paint in legible letters the number of passengers which a public stage carriage may hold, and the name of the proprietor of the carriage, shall be an offence—it was contended that this provision would be satisfied if Irish letters were used. This, I think, is the *reductio ad absurdum* of the argument put forward on behalf of the defendant. It would, indeed, be strange if Irish characters were sufficient in the great towns of Ireland. In Dublin, Cork, Limerick, Belfast, Irish is not spoken or read by the great body of the citizens. It is, in my opinion, clear that the letters must be of the English type. Any other decision would lead to intermi-

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nable confusion—if the letters were to alternate from English to Irish and Irish to English according as the localities varied, and according as the relative number of English- and Irish-speaking persons therein differed and varied from time to time, there would indeed be great confusion. We think the decision of the magistrates was right, not on the ground that the letters were not legible, but on the ground that they were not of the English character or type.

ANDREWS, J.:—

The question to be decided in this case depends upon the true construction of the 12th section of the Summary Jurisdiction Act (14 & 15 Vict. c. 92), which renders liable to a fine, amongst other persons, any owner of a cart, or other vehicle therein mentioned, used for the conveyance of goods, who shall use, or allow the same to be used, on any public road or street, without having his name and residence painted on some conspicuous part of the right side thereof "in legible letters," not less than 1 inch in height, and in a different colour from the ground on which the same is painted, and in words at length. The complaint against the defendant was for having on the public road at Kill, in the district of Dunfanaghy, in the county of Donegal, a cart (of which he was the owner) for the conveyance of goods without having his name and residence painted thereon in legible letters as required by this 12th section. The ground of the complaint was that the letters in which the defendant's name and residence were painted on his cart were letters in the Irish, and not in the English, character. The Justices convicted the defendant, and fined him one shilling, with one shilling as costs, and, in my opinion, they were correct in point of law in convicting him, although I do not concur in the reason they gave for their decision, namely, that they were of opinion that the letters, being in Irish letters, were not in legible letters according to the Act. The fact that the letters were in the Irish character did not, in my opinion, prevent them from being "legible" within the meaning of the Act, and there was no other objection to their legibility. The valid objection to them, in my opinion, was that they were in the Irish character. The Act in question was passed for the

protection of the public throughout the whole of Ireland, in which English is the language generally spoken, and letters in the English character are generally used, and understood; and in by far the greater part of Ireland, and by far the greater part of its population, the Irish language is not spoken, and letters in the Irish character are not understood. The Act is in the English language, and complaints under it are to be heard and determined by Justices who speak in the English language, and in Courts in whose proceedings the English language is used. There is no indication in the Act that letters of different characters are to be used in different parts of Ireland. There would be very great difficulty in determining, if indeed it were possible to determine, in what specific places Irish letters were to be used, and in what specific places English letters were to be used, and what was to be done if the cart went outside such places; and even in districts where Irish letters would be understood by many, there would be others, and probably many others, who were entitled to the protection of the Act, by whom Irish letters would not be understood, and there might also be, and probably would be, peace officers whose duty required them to bring offenders to justice, and by whom Irish letters would not be understood so as to enable them to ascertain from the painted name and address on the cart who the offending owner was and where he resided.

I think it clear that the framers of the Act contemplated one kind of characters only in which the name and address should be painted; and I can entertain no doubt whatever, notwithstanding the very ingenious, interesting, and, from a literary point of view, instructive arguments of Mr. Walsh and Mr. Pearse, that the letters in which, under the 12th section of the Summary Jurisdiction Act, the owner's name is required to be painted on the vehicles therein mentioned, when used on a public road, are letters in the English characters now in use. I am also of opinion that the owner's name, as expressed in English letters, should be the name by which he is generally known, and that his residence, as expressed in English letters, should be the name by which it is generally known. I am unable to agree with the suggestion made by Mr. Walsh, that there is any such identity or similarity between letters in the Irish

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character and letters in the English character now in use, as to enable those who understand the English to understand the Irish letters also. The order we should, therefore, make on the case stated by the Justices, in which the character of the letters only was in question, should, in my opinion, be as follows, namely :—The Court being of opinion and deciding that, upon the true construction of section 12, sub-section 1, of the Act 14 & 15 Vict. c. 92, the legible letters therein referred to are such legible English letters as are now in use, doth declare that the Justices' determination in convicting the defendant was correct in point of law, and doth order that the said conviction be, and the same is hereby, affirmed.

The question, however, being apparently a new one, which has never been raised on this Act before, I agree that the affirmance of the conviction should be without costs.

Gibson, J :—

This case raises the novel and curious question, whether, under the statute requiring the owner of a vehicle to have his name and address painted in legible letters of certain size, such owner is at liberty to use Irish characters. We find similar legislation as to carriages in England and Scotland. The importance of the case is great, as there are many statutes prescribing the use of forms, labels, and notices with legible letters. Some of these extend to the entire United Kingdom, some relate to Ireland only. Examples of the former type are the Merchant Shipping Act, 1854, section 480, as to marine-store dealers ; the Sale of Poisons Act, 33 & 34 Vict. c. 26, section 2 ; the Sale of Food and Drugs Act, 1875, section 8 ; the Margarine Act, 1887, section 6 ; the Motor Car Act, 1903 ; the Excise and Licensing Statutes. Irish Statutes containing analogous provisions are the Pawnbrokers Act, 26 Geo. 2 (Ir.), sections 16, 38, and 48, and 3 Edw. 7, c. 44. No authority has been cited, and probably none exists, in reference to the question—what kind of character is contemplated by these statutes. The effect of our decision may have wide operation.

Mr. Atkinson contended that the use of defendant's Irish name or *alias* was itself a violation of the Act, inasmuch as (he argued)

it was not his true name. What is a man's name is a question of fact. No such point was decided by the magistrates, nor is it open on the case. I do not, therefore, discuss it, but confine my judgment to the one question, Was it lawful for the defendant to give his name and address in Irish letters?

Counsel have not cited, and I have failed to discover, any statute relating to this country in which Ireland is treated as bi-lingual and requiring special and distinctive treatment accordingly, or in which recognition was given to the fact that in certain parts of the island the inhabitants used the Irish tongue. For religious purposes one would have expected that some special provision would have been made, when there was an established church, similar to that in Wales; but for civil purposes there is no trace in the statute book of the recognition of any language but English. It is hardly questioned by counsel that where certain forms of words or information are prescribed by statute, the language to be used must be English, unless the contrary is expressed, of which no example has been cited. Accordingly, in this very statute, 14 & 15 Vict. c. 92, section 11, sub-sect. 3, which requires the number of passengers to be stated, it is admitted that English words giving this information must be employed. If English words are compulsory, why not English letters? Why write English words in Irish?

The statute 11 Geo. 2, c. 6 (Ir.), which directs that all proceedings in the Courts shall be in English, was referred to as raising some kind of inference that, where the use of English was not so prescribed, it was not compulsory. The Act merely follows the English Statute, 4 Geo. 2, and its object was to get rid of the venerable absurdity of entering Court records in foreign languages. The languages there mentioned were Latin and French, not Irish, which was never the judicial language of Ireland since it became attached to the English Crown. This Act gives no support to the notion that wherever Irish is not prohibited it may be used. If any such argument could be advanced, it would go to show that Latin and French, in fact any language, could be used as well as Irish. As far back as 1362 the use of the English tongue was enjoined in oral debates and judgments in Court: 36 Edw. 3, st. 1,

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c. 15. No such provision was ever made as to Irish. The statute was founded on French not being then understood.

What is the effect of the expression "legible letters" in the statute? As already noted, it is often found in legislation. Whether "legible" bears the meaning we find in 11 Geo. 2, c. 6, or merely signifies "clearly decipherable and distinct," the result is the same. What kind of letters are spoken of? To whom are they to be legible?

Three possible views may be taken—(1) so long as the letters are distinctly delineated, the letters of any known language may be adopted; or, as this statute relates to Ireland only, those of any language in familiar use in Ireland; or at least Irish letters; (2) only recognized and customary English letters are admissible; (3) what legible letters may be depends on the speech of the particular locality, the question being one of fact. What may be legible letters in Donegal, may not be legible letters in Carlow.

1. Mr. Walsh contended strongly for the proposition that any known letters could be used. This would exclude cases where there were no letters, such as Ogham and picture hieroglyphics, but would authorize all known characters such as Russian, Czech, Greek, Persian, &c. As the object of the Act is to procure identification, and as the suggested construction would entirely frustrate such object, the interpretation may be at once rejected.

A more moderate suggestion was that all inhabitants of Ireland could use the characters of any language spoken or written there. This would cover Yiddish, Hebrew, and other languages used by certain denizens in our island, and is open to the same objection. The last suggestion was that Irish, as the old national language, was at least allowable. I have already pointed out that our Legislature never distinguishes between the English-speaking and Irish-speaking parts of our country; if English is not the prescribed character, is any character prescribed? There may be a national or sentimental ground naturally recommending Irish; but there is nothing in the statute to show that Irish was to be used rather than other language or letters, unless the letters to be used depend on the speech of the locality—a matter to be considered presently.

2. The second view is that English letters in familiar use—not obsolete letters known only to the archæologist—alone are contemplated and alone can be used. The arguments for this construction, which I adopt, are strong. In Imperial statutes the same expression is used, and it is hard to suppose that Parliament ever intended in such cases that throughout the United Kingdom Gaelic letters should be used at discretion, to the great embarrassment and evasion of the law. If letters other than English can be used, there appears to be no restriction. The main topic, however, is the plain object of the statute, which was to protect all the King's subjects who happen to be in Ireland, not those resident in a particular locality. The common popular language is English; English words are written and printed in English letters. For the ordinary affairs of life everyone is presumed to use English, while Irish is the possession of few: *ad ea quæ frequentius accidunt jura adaptantur.* An Englishman, or Dublin or Belfast citizen, if knocked down by an Irish cart in any part of the country, whether Connemara or elsewhere, is entitled to have the name and address of the offender in characters that he can read. If Irish letters are used, he may be powerless to identify. No practical inconvenience is caused if the statute is construed as requiring English letters; while the permissive use of Irish characters would introduce—and introduce without any necessity—encouragement and facility for escaping identification. I do not suggest that there was any such motive in this case.

3. The third possible construction is, that the legible letters to be used vary according to the character and speech of the neighbourhood. This seems quite unsustainable. It might possibly make the use of English illegal in Irish Donegal, and Irish illegal in Carlow, as it might be held, as a matter of fact, that English letters were not legible in an Irish district, and *vice versa*. There would thus be no certain standard letters. The statute applies to all Ireland, and does not allow local exceptions. There must be one primary set of written symbols corresponding with the English language. The use of Irish roads is not confined to those who live in particular localities and speak a special language. The entire public are entitled to travel on public roads everywhere, and the statute ought to be construed as affording everyone—not

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merely the few who know Irish—the necessary means of identifying negligent carriage-owners.

4. A further point made was that, assuming English to be the prescribed character, there was no essential difference between English and Irish characters; careful examination would discover in the Irish letters their English equivalents; and historically English and Irish characters came from the same origin. I cannot, however, accept this view. Many of the letters in the two languages are alike, just as many Greek letters resemble Latin, but there appears to be marked dissimilarity—particularly in the case of some letters; and even if the resemblance was closer than it is, an injured person ought to be in a position to read at a glance the name and address without the necessity of an examination which, in the case of many, if not most, persons would be impossible. Practically everyone can read large English print. Few, particularly uneducated persons, could decipher Irish on a cart, particularly after injury or in the confusion of an accident.

The interesting antiquarian discussion on the history of the form of Saxon and Keltic letters does not help. The statute refers not to prehistoric or obsolete shapes of letters, but to living symbols. Perhaps, in the procession of ages, the shape of English letters may be changed, and even a modified alphabet adopted. When, if ever, that time comes, it may be necessary to consider whether the Summary Jurisdiction Act may not be read as referring to the characters for the time being in use as the accepted symbols to represent the vernacular speech. Meanwhile I adjourn that discussion, having at present only to consider the current notation of the existing English tongue.

In case the defendant should desire to depict his name, &c., in his own language, I see no objection to his doing so on the near side of the cart, as the statute only prescribes the lettering on the off-side.

To avoid misconception, I add that I confine my decision to a case where the obligation to letter is for general public protection, and where the purpose of the statute requires or assumes the use of the common and familiar letters of our general language. I do not deal with statutes intended to protect particular individuals, to whom notices or labels of a

prescribed character are required to be given, *e.g.*, the Act of 1875, c. 63, s. 8. Somewhat different considerations may there apply. I do not suggest that the construction would be different, but I offer no opinion on such statutes, where the party receiving the notice understands it.

Solicitor for the appellant: *P. M. Gallagher.*

Solicitor for the respondent: *Sir P. Coll.*

J. G. T.

BUTLER *v.* SPRINGMOUNT CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY (1).

Industrial and Provident Society—Alteration of rules—Validity of alteration—Conclusiveness of acknowledgment of registry—Power of Society to alter rights of their servants—Industrial and Provident Societies Act, 1893 (56 & 57 *Vict. c.* 39), *sect.* 10, *sub-sect.* 3.

The plaintiff was elected general manager, at a weekly salary, of the defendant Society, a society registered under the Industrial and Provident Societies Act, 1893. At the time of his election a fundamental rule of the Society was that the manager could not be dismissed except by a two-thirds majority at a special general meeting; and, by another rule of the Society, fundamental rules could not be altered except by a two-thirds majority at a special meeting. Subsequently to plaintiff's election it was resolved, at a meeting of the committee of the Society, that the rule as to the dismissal of the manager should be amended so as to give the committee power to dismiss the manager, and notice of this amendment was given to the Registrar of Friendly Societies, who issued to the Society an acknowledgment of the registry of the amendment, as provided by sect. 10, sub-sect. 3, of the Act. The committee subsequently resolved to dismiss the plaintiff, and gave him one week's notice of dismissal. The plaintiff, when elected manager, was generally aware of the rules, and knew that he could be dismissed only by a two-thirds majority at a special general meeting. He had no knowledge of the amendment in the rule until after his dismissal:—

Held, by the King's Bench Division and by the Court of Appeal, that the acknowledgment of registry by the registrar was conclusive as to the validity of the amendment.

Rosenberg v. *Northumberland Building Society* (22 Q. B. D. 373) followed and applied.

(1) Before LORD O'BRIEN, L.C.J., and ANDREWS and GIBSON, JJ.

K. B. Div. 1905.

BUTLER *v.* SPRING-MOUNT DAIRY SOCIETY.

Held, also, by the King's Bench Division (Lord O'Brien, L.C.J., and Gibson, J.; Andrews, J., *diss.*) and by the Court of Appeal, that the amendment was binding on the plaintiff so as to render his dismissal valid.

SPECIAL CASE stated upon the trial of a Civil Bill Appeal by Madden, J.

The material portions of the case were as follows:—

"2. By civil bill, dated the 9th October, 1904, the plaintiff claimed £50, part of the larger sum of £50 2*s.* 10*d.*, due by the defendants to the plaintiff for salary, as manager, to the 11th September, 1904, the plaintiff being willing to accept the said sum of £50 in full satisfaction and discharge of the said sum so due.

"3. The County Court Judge gave a decree for £41 2*s.* 10*d.*, and costs. The defendants appealed, and the case came before me on appeal, as Judge of Assize, at the Spring Assizes for the South Riding of the county of Tipperary.

"4. The plaintiff was elected manager of the defendant Society on the 24th March, 1902, at a salary of 30*s.* per week, and continued to act in that capacity until the 31st March, 1904, when he received one week's notice of dismissal.

"5. The said notice of dismissal was given to the plaintiff pursuant to a resolution of the committee of the said Society, dated 24th March, 1904, as follows:—'Proposed by William Smith and seconded by Jeremiah Ryan, that we dispense with the service of our manager, John Butler, and that we give him a week's notice to-day. Passed unanimously.'

"6. The defendant Society is a society duly registered under the provisions of the Industrial and Provident Societies Act, 1893. The rules of the said Society were duly registered with the Registrar of Friendly Societies for Ireland on the 10th July, 1896.

"7. By rule 93 (5) it is provided as follows:—'The committee may by a vote of three-fifths of their number, if not more than five, or two-thirds, if over that limit, suspend the manager from the execution of his duties until they can bring the question of the ground of such suspension before a special general meeting which shall be convened with the least possible delay, and may either reinstate the manager or continue his suspension for the purpose of

investigation, or by the vote of a majority of two-thirds of the members present, remove him.'

"8. Special rule 13 provides that fundamental rules shall only be altered or rescinded by a two-thirds majority of members present at any special meeting, said two-thirds being holders of, or holding proxies from the holders of, at least two-thirds of the nominal capital of the company. Rule 93 (5) is a fundamental rule within the meaning of special rule 13.

"9. At a meeting of the committee of said Society, held on the 4th August, 1902, the resolution of which the following is the minute, was passed unanimously:—'It was unanimously decided to alter sub-section 5 of rule 93, so as to give the committee power to dispense with the services of the manager.'

"10. In pursuance of said resolution, rule 93 (5) was amended by the committee as follows:—'31. General rule 93, clause 5, shall not apply. The committee shall have power at any regularly constituted ordinary or special meeting to dispense with the services of the manager' . . .

"11. Notice of the said amendment of the rules of the defendant Society was given to the Registrar of Friendly Societies on the 26th August, 1903, and he thereupon gave an acknowledgment of the registry of the said amendment.

"12 It was admitted by the defendants that the committee had no power to alter or amend the rules of the Society. The plaintiff at the time when he was first employed by the defendants was generally aware of the rules of the Society, and he knew that he could be dismissed only by a two-thirds majority present at a special general meeting. He had no notice nor knowledge of the attempted alteration in the rules until after his alleged dismissal."

The questions for the Court were:—

1. Was the amendment mentioned in paragraph 10 of the case valid?

2. If it was valid, was it binding on the plaintiff?

If either of the questions was answered in the negative, the decree of the County Court Judge was to be affirmed. If both the questions were answered in the affirmative, the decree was to be reduced to the sum of £5 2*s.* 10*d.*

K. B. Div. 1905.

BUTLER v. SPRINGMOUNT DAIRY SOCIETY.

De Renzy (with him *Herbert Wilson, K.C.*), for the defendants:—

As to the first question, we submit that the acknowledgment by the Registrar of the registry of the amendment, which is given under section 10 (3) of the Industrial and Provident Societies Act, 1893, (1) is conclusive evidence of the validity of such amendment: *Rosenberg* v. *Northumberland Building Society* (2); *Dewhurst* v. *Clarkson* (3); *Glover* v. *Giles* (4).

As to the second question, we submit that the amendment was binding on the plaintiff. He entered the service of the defendants as a weekly servant, and it is found that he was generally aware of the rules of the Society. He must therefore be taken to have contracted with knowledge that these rules, including the rule as to his dismissal, could be altered, and he is bound by such alteration: *Smith* v. *Galloway* (5).

Molony, K.C., and *Corvan*, for the plaintiff:—

First.—The acknowledgment of the Registrar is not conclusive in a case like the present, where the amendment purports to be made by a body which has no authority to make it: *Laing* v. *Reed* (6). *Rosenberg* v. *The Northumberland Building Society* (2) only decides that such acknowledgment is conclusive that all the necessary preliminary steps have been taken, such as service of notices, &c. Moreover, that case, as well as the other cases relied on by the defendants on this point, were decided on sections of statutes materially different from the sub-section in question here.

Secondly.—Admitting the amendment to have been validly made, it is not binding on the plaintiff, who is not a member of the Society. The power of altering rules must be confined to the internal rights of the members of the Society: *Strohmenger* v. *Finsbury Permanent Building Society, per* Chitty, L.J. (7). There

(1) Section 10 (3) provides that "The Registrar shall, on being satisfied that any amendment of a rule is not contrary to the provisions of this Act, issue to the Society an acknowledgment of registry of the same, which shall be conclusive evidence that the same is duly registered."
(2) 22 Q. B. D. 373.
(3) 3 E. & B. 194.
(4) 18 Ch. D. 173.
(5) [1898] 1 Q. B. 71.
(6) L. R. 5 Ch. App. 4.
(7) [1897] 2 Ch. 469, at p. 480.

is no power to alter the rules so as to affect the contract of employment already entered into by the Society with the plaintiff, except with his consent: *Souter* v. *Davies* (1). See also section 22 of the Industrial and Provident Societies Act, 1893, which makes the rules binding only on the society and the members thereof and persons claiming under them. It is argued that the plaintiff is to be taken as having contracted subject to the power of the defendants to alter their rules; but, assuming that this is so, he must also be taken to have contracted with the benefit of the rule that the rules can only be altered in a particular way, and an alteration made otherwise is not binding on him.

[They also referred to *Bradbury* v. *Wild* (2); *Reg.* v. *Brabrook* (3); *Gardner* v. *Lucas* (4)].

De Renzy, in reply.

Cur. adv. vult.

June 27.

GIBSON, J.:—

I agree that *Rosenberg's Case* (5) establishes that the amendment, having been duly registered, must be accepted as valid.

Assuming that the amended rule is substituted for the previous rule requiring a certain majority before the manager could be removed, is the plaintiff bound by the alteration? I am aware of no authority for holding that the continuance of the internal constitution and rules of a society or company has, in the absence of express words, been held to be part of a contract of employment or otherwise with such society or company. Here the contract was only, on its face, for a weekly hiring. Such hiring could be determined by a week's notice; the Society preserves its continuous identity, and though, under the then rules of the Society, the concurrence of a certain majority was essential before the plaintiff could be removed, that was an accidental extrinsic circumstance not forming part of the contract. The case only finds in general terms knowledge by the plaintiff of the rules, but does not state

(1) 39 S. J. 264.
(2) [1893] 1 Ch. 377.
(3) 69 L. T. (N. S.) 718.
(4) 3 A. C. 582.
(5) 22 Q. B. D. 373.

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Gibson, J.

anything from which an obligation on the defendants' part never to alter their rules should be inferred. Mere knowledge on the part of the plaintiff is not a contract—each party must agree to the terms. Whether the rules were altered in exact conformity with the original powers, or by registration conferring constructive validity, the result is the same. If the plaintiff had been served with notice of dismissal which was invalid as being contrary to the rules, he would not have been bound by such notice—not because it violated the terms of his contract of employment, but because it was *ultra vires* on the part of the Society. Here the notice was, according to the subsisting rules of the Society, lawful and regular, and there is nothing in the case to show that it was a term of his employment that the internal organization of the Society as to the power to determine his service should remain unaltered. Such cases as *Brace* v. *Calder* (1); *Inchbald's Case* (2); and *Stirling's Case* (3) are distinguishable. In each of them something was done which directly affected what was the contract of employment. In the absence of clear and explicit language, a contract by a company with its employee not to alter its internal articles and rules ought not to be inferred, and, as I am not aware of any case where such inference was drawn, I feel bound to hold that the plaintiff was bound by the new rule.

ANDREWS, J.:—

Upon the facts stated in this case I think the plaintiff's contract of employment with the defendants must, as a matter of legal inference, be taken to have been that he was removable as their manager only in the manner in which he could have been removed under Rule 93, clause 5, as it stood at the time when the contract with the plaintiff was entered into, namely, on the 24th of March, 1902. Even if, however, the plaintiff's contract must be inferred to have been that he was removable as the defendants' manager either under rule 93, clause 5, or any alteration thereof which might be made in pursuance of the special rule [illegible] (a view which I am unable to adopt), still it could not, in my opinion, be inferred that he contracted that he should be removable

(1) [1895] 2 Q. B. 253. (2) 17 C. B. (N. S.) 733. (3) 5 B. & S. 840.

under an unauthorised alteration of rule 93, clause 5, which only became incapable of being questioned by the conclusive effect of its registration; and, therefore, although, upon the authorities of *Dewhurst* v. *Clarkson* (1), and *Rosenberg* v. *The Northumberland Building Society* (2), the subsequent amendment, mentioned in the 10th paragraph of the case stated, of rule 93, clause 5, must now, I think, be accepted as valid, the plaintiff was not, in my opinion, bound thereby under his previous contract of employment, and his dismissal was not a valid one. The questions in the case which the learned Judge reserved for the Court ought therefore, in my opinion, to be answered as follows:—

1. The amendment mentioned in paragraph 10 of the case must now be accepted as valid.

2. But it was not binding on the plaintiff under his previous contract of employment with the Society, so as to render his dismissal by the committee valid.

LORD O'BRIEN, L.C.J.:—

This is a somewhat difficult case, rendered to me more difficult still, because my brethren disagree upon one point.

As to the first point argued, I agree with my brethren that it is concluded by the case of *Rosenberg* v. *Northumberland Building Society* (2). As to the second point, I agree in the view taken by my brother Gibson. I think it was not a part of the contract of service between plaintiff and defendants, certainly it was not an express term of it, that the hand to dismiss should continue the same throughout. I think that the provisions in the rules as to dismissal were merely for the internal regulation of the Company, and were extrinsic to the contract. If there was any condition as to dismissal, it was that the hand to dismiss should be the legal hand for the time being, that is to say in this case, having regard to *Rosenberg's Case* (2), the existing committee. In fact, the case comes to this, was the action of the committee *intra vires* or *ultra vires*? Having regard to *Rosenberg's Case* (2), I think it was *intra vires*.

We will give no costs of the case stated.

J. G. T.

(1) 3 E & B. 194. (2) 22 Q. B. D. 373.

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The plaintiff appealed.

Molony, K.C., and *Corvan*, for the appellant, cited, in addition to the cases cited below, *Bailey* v. *British Equitable Assurance Company* (1).

H. Wilson, K.C., and *De Renzy*, for the respondents.

The Court of Appeal (FITZ GIBBON, WALKER, and HOLMES, L.JJ.) dismissed the appeal without calling on counsel for the respondents.

Solicitor for the plaintiff : *J. Cashin.*

Solicitor for the defendant : *D. J. Higgins.*

R. D. M.

Appeal. 1906.

Feb. 15, 26.

IN RE THE FINANCE ACT, 1894, AND COCHRANE (2).

Revenue—Estate duty—Settlement—Gift inter vivos—*Interest retained by settlor—Customs and Inland Revenue Act,* 1881 (44 *&* 45 *Vict. c.* 12), *section* 38 (2), *as amended by the Customs and Inland Revenue Act,* 1889 (52 *Vict. c.* 7), *section* 11, *and the Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *section* 2 (c).

By a settlement, dated the 4th September, 1902, C. conveyed to trustees a sum of £15,000 invested on mortgage, upon trust to pay out of the income a sum of £575 to his daughter Mrs. D. for life, and after her death, as to the said sum of £15,000, in trust for such child or children as Mrs. D. should appoint; and in default of appointment for the children equally, who, being sons, should attain twenty-one, or, being daughters, should attain twenty-one or marry. There was a power to Mrs. D. to appoint to her husband an annuity of £300 a year for his life, in the event of his surviving his wife. If there should be no child who, being a son, should attain twenty-one, or a daughter attain that age or marry, the trustees were to hold the trust funds after the death of Mrs. D. (but subject to the annuity to the husband) in trust for C. absolutely. The trustees, during the life of Mrs. D., were to hold the

(1) [1904] 1 Ch. 374. This case has been since reversed by the House of Lords—[1906] A. C. 35.

(2) Before WALKER, C., and FITZ GIBBON and HOLMES, L.JJ.

balance of the income produced by the £15,000 after payment of the annuity of £575 to Mrs. D. (or the annuity to the husband), upon trust for C. absolutely. The mortgage on which the £15,000 was invested produced £675 per annum. C. died on September 11th, 1904:—

Held (affirming the judgment of the King's Bench Division), that neither the trust for C. of the surplus income, after payment to Mrs. D. of the annuity of £575, nor the ultimate contingent trust for C. of the *corpus* of the fund, rendered the gift one "of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise," within the meaning of clause (a) of the Customs and Inland Revenue Act, 1881, s. 38 (2), as amended by sect. 11 of the Customs and Inland Revenue Act, 1889, and the Finance Act, 1894, s. 2, clause (c), and that neither estate duty nor "settlement estate duty" was payable by the executors of C. in respect of such part of the £15,000 as was settled on Mrs. D., her husband, and issue.

APPEAL by the Crown from the King's Bench Division, reported [1905] 2 I. R. 626, where the facts are fully stated.

The Attorney-General (*The Right Hon. R. R. Cherry, K.C.*), *The Solicitor-General* (*Redmond Barry, K.C.*), and *E. C. Coll*, for the appellants.

Ronan, K.C., *Herbert Wilson, K.C.*, and *D. M. Wilson*, for the respondents.

WALKER, C.:—

Feb. 26.

I am entirely satisfied not only with the conclusion of the Lord Chief Baron and the Judges who sat with him in the King's Bench Division, but also with the reasoning on which their conclusions are founded.

The only question worthy of consideration is whether this property on which the Crown claim duties is property taken under any gift whenever made of which *bona fide* possession and enjoyment were not assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise.

What is the meaning of the word "gift" in the statute? It is settled that we must, in applying the statute, look at the substance of the transaction and disregard conveyancing forms.

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It is contended, on behalf of the Crown, that if there be a resulting trust to the donor of any part, however small, of a capital sum settled by a donor, estate duty must be paid on the entire capital sum within the meaning and true construction of the section. This is a contention I cannot assent to. In order to ascertain what is the "gift," we must see what is given. Does the donor give what he does not part with? I think he does not give what he reserves or retains; and if it was not included in the gift he made, then there was an entire exclusion of the donor from the property taken under the gift, and what was given was exclusively possessed and enjoyed by the donee.

The same reasoning applies to the effect of the trust of the surplus income during Mrs. Day's life. She only got £575 per annum during her life, and the beneficial interest in the surplus was not given to her. Sir Henry Cochrane reserved nothing out of his "gift." He did not secure any benefit to himself by any collateral covenant, as was done in *The Attorney-General* v. *Worrall* (1). It has always been conceded that estate duty is payable on the interests in the fund which Sir Henry Cochrane did not give.

It was admitted during the argument by counsel for the Crown that the executors were entitled to postpone payment of duty on the expectancy until the interest fell into possession, inasmuch as, under the circumstances, they could not have been taken to have exercised the option.

The case most relied on by counsel for the Crown was *The Attorney-General* v. *Lord Grey* (2). It is only necessary to read that decision carefully in order to see that that case is really within the section, and how unlike the present case it is. In *The Attorney-General* v. *Lord Grey* (2), real estate, leaseholds, and personalty were conveyed by deed in 1885 to the use that the grantor should receive £4000 per annum for life out of all the property, other than the mansion-house, and he was to be permitted to occupy the mansion-house, its effects and appurtenances, during his life. There were covenants by the grantee to pay certain annuities, and mortgage, and other debts; to pay the annual rent-

(1) [1895] 1 Q. B. 99. (2) [1900] A. C. 124.

charge of £4000; to pay at his death all the grantor's debts, and funeral and testamentary expenses, to the exhaustion of all the grantor's property; and there was a power of revocation if the grantee died in the lifetime of the grantor, or if there was a breach of covenant. By deed of the 26th of September, 1894, the late Earl released the rentcharge and the power of revocation.

The covenant to pay the donor's debts was a reservation of an interest, though not an interest terminable on death, and negatives the exclusion of the donor from any benefit in the property the subject of the gift.

It is not surprising that Lord Halsbury treated that case as an unarguable one on its facts.

I think the appeal must be dismissed with costs.

FITZ GIBBON, L. J.:—

I concur with the Lord Chancellor; and I adopt the judgment of the Lord Chief Baron. The claim of the Crown appeared to me to be presented in a shape which showed it to be untenable, as soon as the Attorney-General admitted—as he did—that, if a father gave a portion to his daughter of £1000, in the shape of a specific charge upon a money fund, settled upon the daughter, her husband, and her children, but reverting to the settlor if she had no children, though it became an absolute gift if she had children, the argument for the Crown must be, and was, that it made no difference whether the fund on which the £1000 was charged was £10,000 or £1000, and that, on the father's death, the duty must be paid all the same upon the whole capital value of the fund charged. If a man purporting to make a gift to his daughter tries, Ananias-like, "to keep back part" of it for himself, it may be just enough to make him pay duty on the whole, and that is the mischief at which the Act aims. But Sir Henry Cochrane did nothing of that kind. He gave the annuity absolutely to his daughter, and he gave her and her children the fund in certain events absolutely, so far as he gave it at all; but nothing over that, whether you call it a reversion, a reservation, or a surplus, was included in the gift. What has been absolutely given cannot be afterwards assessed as passing on the donor's death, and only

Appeal. 1906. *In re* COCHRANE. Fitz Gibbon, L.J.

what has not been given can be taken into account for assessment to the death duties.

The merest glance at *Lord Grey's Case* (1) shows that, if there ever was a case to which the statute applied, it was that case. The donor there retained a power of revocation and new appointment, by which he could, in certain events, have taken back the whole property if he liked; and furthermore, he made the donee covenant to pay him a rentcharge during his life, and to pay all his funeral and testamentary expenses and all his debts, at his death, even to the exhaustion of the fund.

In this case, Sir Henry Cochrane did not—to take Lord Halsbury's words—reserve any "benefit" to himself *out of what he gave*, nor "any part of that which purported to be given" *inter vivos*.

HOLMES, L.J.:—

When six Judges have given their reasons for arriving at the same conclusion, a seventh who is in agreement with them cannot, and ought not, to have much to say. I was greatly impressed by the fact that although settlements of property similar to that under consideration are of frequent occurrence, this is the first time that such a claim for estate duty as has been discussed in this matter was made by the Crown. I infer from this that the Inland Revenue Department was advised in both England and Ireland that a claim of this kind could not be sustained; and I was naturally curious to learn the cause of the new departure. We have been told by the Attorney-General that it is the decision in *The Attorney-General* v. *Lord Grey* (1) that has led to this litigation; but, like the Lord Chief Baron, I find the circumstances in the two cases very different. The question is what was taken under a gift from Sir Henry Cochrane contained in the deeds of the 4th September, 1902. Property cannot be said to be taken under a gift when such property never passes from the donor to the donee. If Sir Henry Cochrane had vested the mortgage debt of £15,000 in trustees upon trust to pay out of the interest to be received in respect thereof an annuity of £200 to his daughter

(1) [1900] A. C. 124.

during her life without any further expressed trust, it cannot, I think, be doubted that the only gift thereby given would be the annuity of £200. Sir Henry Cochrane would, in the case put, be entitled to receive the residue of the interest, not because it was retained or reserved out of the gift, but because it had never been part of it. But if this be so, a direction that, subject to the annuity of £200, the residue of the interest was to be paid to Sir Henry Cochrane, could make no difference. To rule otherwise would make the effect of the transaction depend, not upon its real nature, but upon the mode of conveyancing; and even in the absence of authority I would not be prepared to hold that such a thing is possible in construing a well-drawn modern statute. I think, moreover, that authority is clearly in favour of my view. Now, if I am right so far, the rest is a necessary consequence. By the two indentures, Mrs. Day is given an annuity of £575 a year during her life; her husband is given an annuity not exceeding £300, dependent on an appointment thereof by the will of the wife; and, subject thereto after Mrs. Day's death, the capital sum of £15,000 is to go to such of her children as shall answer a particular description. These are the gifts to be found in the two indentures, and estate duty is not to be paid thereon. What is not so given remained the property of Sir Henry Cochrane, not as a reservation from a gift, but as property not given at all. Upon such property, it is admitted that estate duty was payable on his death; but I cannot accept the argument that it is also payable on property which he had parted with completely and irrevocably. This, I understand, was the conclusion arrived at by the Divisional Court. Accordingly, I am of opinion that the appeal ought to be dismissed (1).

Solicitor for the Crown: *The Solicitor of Inland Revenue.*

Solicitor for the executors of Sir H. Cochrane: *Sir Benjamin Whitney.*

R. D. M.

(1) See the decision in *The Attorney-General* v. *Glossop* ([1906] 1 K. B. 284), which was reported subsequent to the above decision of the Court of Appeal.—[REP.]

Appeal.
1905.
Nov. 14, 15.

THE KING (THOMAS POTTS) *v.* THE LOCAL GOVERNMENT BOARD (1).

Local Government—Water supply—Sewage works—"Expenses incurred," meaning of—Area of charge—Contributory place—Public Health (Ireland) Act, 1878 (41 & 42 *Vict. c.* 5), *s.* 232—*Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37)—*Powers of Local Government Board.*

The powers of the Local Government Board to fix the area of charge upon which special expenses shall be chargeable are not confined to cases in which the expenses have actually been incurred, but can be exercised in relation to future estimated expenses.

By sealed order, reciting that the Rural District Council of C. had incurred, or were about to incur, special expenses, for the purpose of providing a water supply and drainage system, and maintaining the same, at the town of B., in the said rural district, the Local Government Board determined that the two electoral divisions of B. urban and B. rural should be the area of charge, upon which all expenses incurred, or which might be incurred, by the council of the said rural district, should be chargeable. The works were mainly intended to benefit the town of B., which was co-extensive with the electoral division of B. urban; but it was alleged by affidavit that benefits from the proposed works would also extend to the electoral division of B. rural, which surrounded the town of B. on every side—viz. the river, which received the sewage from the town, which was the principal source of water supply for portion of B. rural, would be purified; the pipe-line of the waterworks, which would run through a considerable portion of B. rural could be tapped by the ratepayers; and it was proposed to establish a fountain at certain cross-roads for the use of the inhabitants of B. rural:—

Held, that the electoral divisions of B. urban and B. rural, being contributory places within the meaning of section 232 of the Public Health Act, 1878, were places which the Local Government Board was entitled to fix as the area of charge.

Appeal from an order of the King's Bench Division, dated the 16th June, 1905, allowing the cause shown against a conditional order for a writ of *certiorari* to bring up to be quashed a sealed order of the defendants, dated the 25th November, 1904,

(1) Before FitzGibbon, Walker, and Holmes, L.JJ.

fixing the area of charge upon which the expenses of a new water supply and drainage system for the town of Ballybay should be chargeable.

In 1901 a necessity arose in Ballybay, which is situate in the Castleblayney Rural District of the County of Monaghan, for a new water supply and system of sewerage. The necessary steps were taken for that purpose by the Castleblayney Rural District Council, as the sanitary authority for the district, which included the district electoral divisions of Ballybay urban and Ballybay rural. By resolution of the Rural District Council, dated the 11th December, 1901, it was resolved that in the case of Ballybay "special expenses" (as defined by section 232 of the Public Health Act, 1878) should be charged on the district electoral divisions of Ballybay urban and Ballybay rural; and a resolution to the like effect was again passed by the Council on the 15th January, 1902. Schemes were then prepared for the works; and by a further resolution of the Council of the 20th August, 1902, it was resolved that the scheme submitted by the engineer, Mr. Bergin, should be adopted; and it was at the same time resolved that a statement be placed on the minutes to the effect that, in adopting the scheme, the Council acted on the assumption that the area of charge for the expenses proposed to be incurred would be the district electoral divisions of Ballybay urban and Ballybay rural.

Estimates were prepared for carrying out the schemes as follows:—

For the Water Supply, . . .	£2260 3 0
For the Drainage System, . . .	2339 17 0
For Legal Expenses, ...	100 0 0
	£4700 0 0

On the 14th November, 1902, the Local Government Board made the sealed order fixing the district electoral divisions of Ballybay rural and Ballybay urban as the area of charge on which the expenses should be chargeable.

The prosecutor, a farmer possessed of a small farm in the townland of Drumgoole, which formed portion of the electoral division of Ballybay rural, obtained a conditional order, dated the

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27th January, 1904, for a writ of *certiorari* to quash the foregoing sealed order. On the 22nd November, 1904, the King's Bench Division allowed the cause shown against making the conditional order absolute, and refused the application for a writ of *certiorari*: see the case reported [1905] 2 I. R. 324.

On the 25th November, 1904, the Local Government Board rescinded the sealed order of the 14th November, 1902, and on the same day the Board issued a new sealed order by which they determined that the District Electoral Divisions of Ballybay rural and Ballybay urban should be the area of charge on which all expenses incurred, or which might be incurred, by the Council of the Rural District for the purpose should be chargeable. This order contained two recitals, which were not in the former sealed order of the 14th November, 1902, to the following effect:—

> "And whereas the District Electoral Division of Ballybay Rural and the District Electoral Division of Ballybay Urban are within the same Dispensary District, that is to say, the Dispensary District of Ballybay;
>
> "And whereas the works to be executed for the purpose aforesaid are, or will be, situate in part within the said District Electoral Division of Ballybay Rural and in part within the said District Electoral Division of Ballybay Urban."

The prosecutor had in the meanwhile appealed from the judgment of the King's Bench Division, but on the case coming before the Court of Appeal on the 18th January, 1905, the Court declined to hear the appeal, as the sealed order sought to be quashed had been rescinded.

On the 27th February, 1905, the prosecutor obtained a conditional order for a writ of *certiorari* to quash the new sealed order of the defendants, dated the 25th November, 1904, on the grounds—(1) That the order was made without and in excess of jurisdiction; (2) that no expense had been incurred by the rural sanitary authority under sect. 232 of the Public Health Act, 1878, before the making of the said order; (3) that no ascertainment of common benefit as between Ballybay Urban and Ballybay Rural Electoral Divisions, or any other area capable of being made a contributory place had taken place, and that no works involving common benefit as between Ballybay Rural and Ballybay Urban

Electoral Division had been executed; (4) that no apportionment, either for the purpose of construction or for the purpose of maintenance, had been made; (5) that no opportunity was allowed prior to the making of the said order for an appeal to the Local Government Board by ratepayers on the question of apportionment; (6) that the area of charge mentioned in the said order was not a contributory place in respect of which the special expenses referred to in the said order were incurred, or to be incurred. The evidence relied upon by the prosecutor and the defendants in support of their cases was the same as that given in the Court below: see [1905] 2 I. R. 326–329. On the 16th June, 1905, the King's Bench Division allowed the cause shown against making the conditional order absolute, holding that all the points raised had been covered by the previous decision of the 22nd November, 1904. From that order the prosecutor appealed.

Healy, K.C., and *T. J. Smyth*, for the appellant:—

We submit that there was no jurisdiction to charge the Ballybay rural district for works which are solely for the use and benefit of the urban district. There must be a common benefit in fact to render any area a contributory place. The rural district got no opportunity of objecting to the area of charge. "Expenses incurred" in sect. 232 of the Public Health Act of 1878, must mean actual or past expenses. The order does not show on its face that the expenses incurred were in, or in respect of, a contributory place. This point was not decided in the *Ballycastle Case* (1). In *Mayor and Aldermen of West Ham* v. *Grant* (2), the right to charge the property of frontagers under sect. 257 of the Public Health Act of 1875, with expenses incurred, was held not to extend to estimated expenses.

The Attorney-General (*The Right Hon. J. Atkinson, K.C.*), *The Solicitor-General* (*J. H. Campbell, K.C.*), *James Chambers, K.C.*, and *Chaytor*, for the Local Government Board:—

The new sealed order was made, and the additional recitals were inserted to show on the face of the order that there was jurisdiction.

(1) [1904] 2 I. R. 270. (2) 40 Ch. D. 331.

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There is evidence on the facts that the electoral division of Ballybay rural will be benefited, and the amount of the benefit cannot be questioned in fixing the area of charge. "Expenses incurred" must include estimated expenses, otherwise the Act would be unworkable; the money could not be borrowed, and the work could not be done: *Horn* v. *Sleaford Rural District Council* (1). The *West Ham Case* (2) does not apply; it decided that expenses could not be recovered by proceedings against the land before the work was done.

John Cusack, for the Castleblayney Rural District Council.

Nov. 15.

FITZ GIBBON, L.J.:—

Two main objections have been made against the order which is the subject of the litigation—(1) That there was no jurisdiction to charge the Ballybay Rural District, because it received no benefit from the works; (2) that the period for determining the area of charge had not arrived, because no expense had been incurred when the order was made.

We accept the Attorney-General's explanation of the making of a new order, after the case was first decided by the King's Bench. It had been suggested that there was a formal objection to the former order, in that it did not show on the face of it the facts which gave jurisdiction to include Ballybay Rural District in the area of charge. The first order was revoked, and the second order was framed with recitals intended to show that the Rural District was chargeable as a contributory place. We cannot say that it was wrong to take this step during the progress of the proceedings, though, speaking for myself, I think that at least one of the recitals inserted in the new order was immaterial, and I am not satisfied that any of them was necessary.

On the first question—if the *Ballycastle Case* (3) decided anything, it decided that no portion of the earth's surface can be made a contributory place for the purposes of the Public Health Act, 1878, s. 232, unless it is a place to which water is to be supplied,

(1) [1898] 2 Q. B. 358. (2) 40 Ch. D. 331. (3) [1904] 2 I. R. 270.

or in which sewers are to be constructed, maintained, or cleansed. The new order satisfies this condition by the following recital :—

> "And whereas the works to be executed for the purpose aforesaid are, or will be, situate in part within the said District Electoral Division of Ballybay Rural and in part within the said District Electoral Division of Ballybay Urban."

There is sufficient evidence to support this recital in fact, and both these electoral divisions are thus shown to be chargeable as contributory places. I am not conscious of having ever said anything to indicate the opinion that, when selecting more contributory places than one to make up an area of charge, the Local Government Board is obliged to select smaller units, or units of different denominations. Provided that each selected unit is within the benefit of the works, I can see no reason to doubt that two dispensary districts, or one dispensary district with one or more electoral divisions or townlands outside it, can be included in an area of charge, so long as no unit is brought in which does not satisfy the condition I have mentioned as to the locality of the works.

The recital that "the District Electoral Division of Ballybay Rural and the District Electoral Division of Ballybay Urban are within the same Dispensary District" has, in my opinion, nothing to do with the validity of the order, which is established, so far as the first question is concerned, by the other recital, viz., that the works are partly situate within each of the two electoral divisions included in the area of charge. That satisfies the essentials laid down in the *Ballycastle Case* (1).

The second point—that the order fixing the area of charge can not be made until the expenses have been actually incurred—would, as the Attorney-General pointed out, upset the working of the Act altogether. The first payment that would have to be made is that for interest and repayment of an instalment of principal, on account of money borrowed for the works. The works could not be undertaken until the loan was sanctioned, and the security for the loan could not be known until the area of charge was fixed. The words of the section are—

(1) [1904] 2 I. R. 270.

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"Special expenses shall be the expenses of the construction, maintenance, and cleansing of sewers in any contributory place within the district, the providing a supply of water to any such place, and all other expenses incurred or payable by the sanitary authority in, or in respect of, any contributory place within the district, and determined by the order of the Local Government Board to be special expenses . . .

"The following areas, situated in a rural sanitary district, shall be contributory places for the purposes of this Act," *i.e.* for the purpose of securing the money to be expended . . . Lastly, "the Local Government Board shall have power to determine on what area of charge, being a contributory place, or consisting of contributory places, any special expenses shall be chargeable"—

that is, chargeable when the expenses come to be paid.

The Local Government Board, therefore, in my opinion, must have power to fix the area of charge before the money is actually required to be paid; and, to put it briefly, I think that this power is exerciseable, at latest, when the works have been sanctioned and the plans approved, and estimates have been made, approximately showing the amount required to meet the expenses which it is intended to incur for the benefit of the area to be charged.

These are the only two points which have been pressed. But I wish to point out that the appellants are, in my opinion, premature in alleging a grievance in the present case, because I read the fourth paragraph of sect. 232 as applicable to cases such as this, where the Local Government Board includes more than one contributory place in the area of charge. When this is done, it becomes the duty of the rural sanitary authority to apportion the expenses in such proportions as it thinks just. This cannot be done until after the area of charge has been fixed. But as soon as two contributory places are brought in, then it is for the rural sanitary authority in the first instance, to say whether the burden is to be borne equally or rateably by the whole area, or whether the several contributory places, having regard to the different degrees of benefit, should bear it in unequal shares. Without doubt, there will be a radiation of benefit round about a town which gets water or sewers, and the public health will be benefited to some extent beyond the town. But if any ten ratepayers, or the payers of one-fifth of the expenses, are aggrieved by

the apportionment made by the sanitary authority, they can deliver a memorial to the Local Government Board, under the fifth paragraph of the section, and the Local Government Board, after due inquiry, will then be bound to make such order in the matter as to it seems equitable.

We are of opinion that the order in this case is good; made at the proper time; made with jurisdiction; and not open to legal objection. The Court below refused the application to quash it without costs; we do not disturb that order, but the appeal, having failed, must be dismissed with costs.

WALKER, L.J.:—

I concur. I think the order impeached satisfies all the requisites, both in law and fact, of our decision in *The Ballycastle Case* (1). The water is to be supplied to both the places mentioned; and if it is necessary to have the ground of jurisdiction stated on the face of the order, the order does so. It shows that the works are for the benefit of each—that is, that there is a common benefit to two places. What the extent of the common benefit is, I do not know. The Local Government Board have power to declare a common benefit; and once they have found that there is, I do not think that we ought to question their decision. The extent of the common benefit comes in after the area of charge has been fixed under section 232.

The only other point against the order was that the order fixing the area of charge should not have been made until the contract was entered into, and the expense incurred. It would be highly inconvenient if this argument in the abstract should prevail; and here there was a decision of the rural sanitary authority made that they were going to construct works, and as to the terms of a contract. They determined to adopt Bergin's contract to do the work for £4700. Special expenses cannot be fixed until the area of charge is fixed, for that is the security on which money is borrowed. In my opinion the decision of the Court below was right, and the appeal should be dismissed with costs.

(1) [1904] 2 I. R. 270.

Appeal. 1905.

THE KING (POTTS) v. L. G. BOARD.

HOLMES, L.J. :—

It was held by this Court, in the *Ballycastle Case* (1), that the area on which special sanitary expenses are chargeable cannot include a contributory place in respect of which no portion of such special expenses is to be incurred; but it also follows from that decision that if the expenses are to be incurred in respect of two contributory places, both might, and indeed ought to, be placed in the area of charge.

The first objection taken to the order impeached in this appeal depends upon whether the first or the second of these propositions applies thereto. Mr. Healy contends that the sanitary works contemplated will only benefit the urban district of Ballybay, and that the rural district, which will receive no benefit, is, therefore, illegally included in the area. I agree with him that common benefit is the test, for I cannot conceive that the mere fact that some of the pipes to convey the water will pass through the rural district would be enough if that district was to derive no advantage therefrom. I am, however, satisfied from the evidence that there will be common benefit. I am not sure that this appears on the face of the order; but I agree with the majority of the Divisional Court that this is not necessary, provided that the fact of common benefit exists. The Lord Chief Justice has referred to the evidence on this point; and I agree with him in the inference he draws from it. Of course, common benefit does not necessarily imply equal benefit. I should think that the advantages accruing to the urban district will far exceed those that will reach the rural district, but the provisions as to apportionment contained in sect. 232 of the Act of 1878 were intended to adjust such inequalities, and I hope they will be found sufficient for this purpose.

This disposes of the first and principal objection to the order. The second relates to the time at which the order was made. It is argued that it was premature, inasmuch as the area of charge can only be determined either after the expenses have been actually incurred, or, at the least, after the local authority has incurred liability to pay them. I cannot find any such provision in the Act. It is not there in express terms, nor does it arise by

(1) [1904] 2 I. R. 270.

necessary implication. Plans for the works were adopted by the local authority, and an estimate of the expenses made. There was thus sufficient information to enable the Local Government Board to determine the area of charge; and, indeed, until this is determined, it is impossible to borrow the money with which the expenses must be defrayed, for no one will lend without knowing the nature and extent of the security for repayment.

Being against the appellant on both grounds, I concur in the judgment of the Court.

Solicitor for the prosecutor: *J. G. Reid.*

Solicitor for the Castleblayney Rural District Council: *Charles Laverty.*

Solicitors for Local Government Board: *T. T. Mecredy & Son.*

R. D. M.

IN THE MATTER OF AN APPLICATION IN INTERPLEADER BY THE REV. JAMES B. BRISTOW (1).

K. B. Div. 1905. Dec. 6.

Assignment of chose in action—Receiver by way of equitable execution appointed before notice of assignment served—Priorities—Supreme Court of Judicature Act (Ireland), 1877, s. 28, sub-s. 6—Interpleader—Costs.

An assignee for value of a debt has priority over a person who subsequently obtains an order appointing him receiver by way of equitable execution over such debt, although the order was obtained before notice of the assignment was given by the assignee to the debtor.

INTERPLEADER SUMMONS.

On the 26th October, 1905, in an action in the King's Bench Division, in which James F. I. Corballis was plaintiff, and the Rev. James B. Bristow, the applicant in the present summons, was defendant, a sum of £50 was assessed by the Master of the Division as the damages payable by the defendant to the plaintiff in that action.

(1) Before BOYD, J.

K. B. Div. 1905.

In re Bristow.

By an indenture, dated the 27th October, 1905, James F. I. Corballis, in consideration of the sum of £58 19*s.* 3*d.* paid to him by William G. Armstrong, his solicitor in the above action, assigned the said sum of £50, recovered in the action, to the said W. G. Armstrong, absolutely. The assignment was executed at 10.40 a.m. on the 27th October. Notice in writing of the assignment was sent by registered letter to Mr. Bristow on the same day, the letter being posted at 11.15 a.m. It was received by Mr. Bristow the following morning.

At 11.10 a.m. on the 27th October, 1905, an order was made by Gibson, J., in an action in the King's Bench Division, in which Major M. J. C. Dennis was plaintiff, and the said James F. I. Corballis was defendant, appointing William R. C. Richardson, Major Dennis's solicitor, receiver by way of equitable execution over the sum of £50 assessed as damages in the action of *Corballis* v. *Bristow*. The order referred to a judgment obtained in the action of *Dennis* v. *Corballis*, on the 24th January, 1905, for £65 16*s.*, and to an affidavit of W. R. C. Richardson, whereby it appeared that the Rev. J. B. Bristow was indebted to the defendant in the sum of £50 for damages assessed on the 26th October, inst., before the master in the action of *Corballis* v. *Bristow*, and ordered that Mr. W. R. C. Richardson, on behalf of Major Dennis, should be appointed "receiver by way of equitable execution (without salary or security) over the said amount so due to the defendant as aforesaid to satisfy in part the plaintiff's said judgment." The order was directed to be served on Mr. Corballis, and also on Mr. Bristow and his solicitor. Oral notice of the order was given before 12 o'clock noon of the 27th October to the town agent of Mr. Bristow's solicitor, and a copy of the order was delivered to him subsequently on the same day. On the following day Mr. Bristow was served personally with the order.

On the 3rd November, 1905, judgment was entered by the plaintiff in the action of *Corballis* v. *Bristow* for the said sum of £50, pursuant to the master's certificate dated 26th October, 1905.

Littledale, for the applicant:—

The applicant claims no interest in the sum of £50, except for his costs of this application. I submit he is entitled to deduct £5 5*s.* for his costs: *In re Johnson* (1).

[BOYD, J.: Declare the applicant entitled to deduct £5 5*s.* for costs.]

It was agreed by the claimants, W. G. Armstrong and W. R. C. Richardson, that the question of the priority of their respective claims should be determined by Boyd, J., in a summary way.

Jefferson, for W. G. Armstrong:—

The appointment of a receiver by way of equitable execution does not create any mortgage, charge or lien on the property: *In re Dickinson* (2); *In re Potts* (3); *In re Lough Neagh Ship Company* (4); *In re J. O'Neill* (5). The order appointing the receiver affects only whatever interest the debtor had in the property: *Wills* v. *Luff* (6), *per* Chitty, J. (p. 200). In the present case, before the receivership order was made, all the interest of Bristow in this sum of £50 had passed to Armstrong under the assignment of the 27th October. Notice to the debtor of the assignment is not necessary to give it priority to the receivership order: *Scott* v. *Lord Hastings* (7); *Arden* v. *Arden* (8), *per* Kay, J. (p. 709).

Patrick D. Kelly, for W. R. C. Richardson:—

A receivership order takes effect from the moment when it is pronounced: *Lavasseur* v. *Mason and Barry* (9). It captures everything except prior perfected incumbrances. The assignment to Armstrong was not complete until the notice required by section 28, sub-sect. 6, of the Judicature Act was served on Bristow, and this was not done until after the order was obtained. Until such notice was served, the assignment to Armstrong was a mere inchoate

(1) [1898] 2 I. R. 551.
(2) 22 Q. B. D. 187.
(3) [1893] 1 Q. B. 648.
(4) [1896] 1 I. R. 29.
(5) 21 L. R. Ir. 211.
(6) 38 Ch. D. 197.
(7) 4 K. & J. 633.
(8) 29 Ch. D. 702.
(9) [1891] 2 Q. B. 73.

K. B. Div. 1905. *In re* Bristow.

assignment of an inchoate right. [He referred to *Lawrence* v. *Harrison* (1); *Fahey* v. *Tobin* (2); *In re Galland* (3)].

Boyd, J.:—

I am of opinion that Mr. Armstrong's assignment takes precedence of the order appointing Mr. Richardson receiver. It is sworn and not contradicted that at 10.40 o'clock on the morning of the 27th October, in the present year, the assignment to Mr. Armstrong was executed by Mr. Corballis. On the same day, in an action of *Dennis* v. *Corballis*, an order was made by this Court appointing Mr. Richardson receiver by way of equitable execution, on behalf of Major Dennis, over this sum of £50. The order is in the following terms:—[His Lordship read the order]. That order was pronounced at ten minutes past eleven on the morning of the 27th October, and therefore subsequently to the assignment to Armstrong. It is argued on behalf of Major Dennis that he is entitled to capture this fund, because the order takes effect from the moment it was pronounced. No doubt it does so take effect, but at the time it was pronounced the property in this sum had passed from Corballis to Armstrong by virtue of a regular assignment. It is well settled that all that a receiver order can act upon is the interest of the debtor, whatever it may be, and here Corballis had not an interest to the value of a farthing in this fund when the order was pronounced. It is, however, contended that the assignment to Armstrong is not good, because under section 28, sub-sect. 6, of the Judicature Act an assignment of a chose in action is not effectual until notice of the assignment is given to the debtor, and that such notice was not given in the present case until after the pronouncing of the receiver order. No doubt, in order to transfer the legal right in a debt, the notice required by that sub-section must be given. But the assignment is good in equity without notice, as is shown by the case of *Langtry and Irwin* v. *O'Rourke* (4). There the Lord Chief Baron, who delivered the judgment of the Court, considered that, independently of notice giving a legal right, there was an equitable right under the assign-

(1) Style, 426.
(2) [1901] 1 I. R. 571.
(3) W. N., 1886, p. 96.
(4) 39 I. L. T. R. 80.

ment. I am of opinion, therefore, that Mr. Armstrong having obtained this assignment prior to the pronouncing of the receiver order, there was no interest left in Mr. Corballis on which that order could attach. The cases cited by Mr. Kelly do not I think touch the real point, which is, was there any interest in Mr. Corballis at the time the order was pronounced.

Under the circumstances I do not think I should give costs against Major Dennis. The receiver order was obtained in perfect good faith, and without notice of the assignment. A question then arose in which a dispute might have been successful. If the matter had been fought out as a record and heavy costs thereby incurred, I should have been inclined to have given costs against Major Dennis, but as by reason of the adoption of the present procedure the costs are small, I shall let each of the claimants bear his own costs. Mr. Bristow will be entitled to deduct £5 5*s.* for his costs.

Solicitors for the applicant: *Torrens & Bristow.*
Solicitor for W. G. Armstrong: *Solicitor in person.*
Solicitors for W. R. C. Richardson: *Richardson & Synnott.*

J. G. T.

THE KING (AT THE PROSECUTION OF RICHARD JOHNSTON) *v.* THE BOARD OF CONSERVATORS OF THE COLERAINE DISTRICT OF FISHERY (1).

*Fishery Acts—Draft-net—License for—Eels—Tender of maximum amount for license—*11 *&* 12 *Vict. c.* 92, *s.* 21.

Draft-nets for eels are amongst the engines mentioned in the schedule to 11 & 12 Vict. c. 92, and the Conservators of Fisheries are bound to issue licenses for such nets to any persons requiring the same on tender of the maximum amount charged therefor; and it is not necessary that the provisions of sect. 21 of the Act should be put in force before such licenses should be issued.

A Board of Conservators passed a resolution fixing the duty for "an eel draft-net," but limiting the time and place within which such should be used.

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

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The Department of Agriculture subsequently settled a form of license for "a draft-net for eels" without such restrictions, under sect. 28 of the Act:—

Held (reversing the decision of the majority of the King's Bench, but affirming the judgment of Lord O'Brien, L.C.J.), that the Conservators were bound to sell a license for a draft-net for eels to any person requiring the same on tender of the maximum charge therefor mentioned in the schedule to the Fishery Act of 1848.

MOTION to make absolute a conditional order for a writ of *mandamus*, directed to the Board of Conservators of the Coleraine District of Fisheries, commanding them to cause a license for the use of draft-nets for the capture of eels in Lough Neagh, pursuant to the provisions of the 11 & 12 Vict. c. 92, to be issued to the prosecutor, Richard Johnston. There are several kinds of fisheries in Lough Neagh, salmon, trout and pollen; and at the outlet on the northern extremity of the Lough there is a permanent eel fishery with fixed nets, and permanent means of taking eels.

The first application made for a license for an eel draft-net for use in Lough Neagh was made by one of the Conservators, John Devlin, junior, who, on the 21st April, 1905, served the following notice on Andrew King, the fishery inspector for the district. "You being an inspector of fisheries, I beg to give you notice that I intend using an eel draft-net in Lough Neagh on the first day of June, and I have made an application to the Board of Conservators for said Board to fix a license on same. For your information I should say that the eel draft-net that I propose using shall be much the same as a pollen draft-net, and its capabilities of capture shall be about the same." Andrew King, having inspected the net, in pursuance of the directions contained in 11 & 12 Vict. c. 92, s. 21, made the following report to the fishery conservators:—"The net referred to is about 110 yards long and 30 feet deep, having a tail or bunt of about 10 yards, and is exactly the same as the draft-net now in use for the capture of pollen, with one exception, and that is that a portion of the tail would be composed of very small meshes, measuring from $\frac{3}{8}$ to $\frac{1}{2}$ an inch from knot to knot. This net would be used from a boat as a hand or draft-net. Its capabilities of capture would be equal to that of a coghill net on which a license duty of £3 is fixed. This net shall be known as the eel draft-net, and shall be designated as such. I may add that above is a correct description of the net which Mr. Devlin proposes to use for

the capture of eels." On the 22nd April, Thomas J. English, the Secretary of the Conservators, received a letter from John Devlin, junior, requiring him to place on the agenda paper for the first meeting of the Conservators a notice of an application to the Board to fix a license on an eel draft-net for Lough Neagh. At the half-yearly meeting, held on the 6th May, 1905, this letter and Andrew King's report were considered at the Board, and a resolution was passed, by a majority, that a license duty be fixed on an eel draft-net for Lough Neagh, to be used from the 1st July to the 31st October in each year, both days inclusive, and a further resolution was passed that the license duty be fixed at £3 per net. On the 17th May, 1905, English informed the Department of Agriculture (Fisheries Branch) by letter of that date of the resolutions, enclosed a copy of the report of Andrew King, and sent a draft of the license intended to be issued for such net for approval of the Department. In reply, he received a letter from the Secretary of the Department, dated the 23rd May, 1905, stating that the Department could not adopt the form of license for a draft-net for eels, as it was not in accordance with the provisions of the statute 11 & 12 Vict. c. 92, s. 28. English wrote to the Secretary on the 24th May, 1905, to know if it was possible to amend the form of the license so that it might be in accordance with the statute, and to know in what way this should be done. The Secretary replied by letter of the 26th May, 1905, that the form of license did not comply with the section, inasmuch as it specified a part of the year for which it should be issued instead of the year, and also virtually fixed a close season. On the 5th June, 1905, English submitted for the approval of the Department a form of license for a draft-net for the capture of eels in the district. The Secretary replied on the 13th June, 1905, that before proceeding any further with the question of the form of license for an eel draft-net, the Department would be glad to know whether the Board of Conservators had considered section 11 of the 8 & 9 Vict. c. 108, which provided for the size of the mesh of nets to be used in inland waters. On the 16th June, 1905, English replied that the section referred to, in conjunction with the 66th section of 5 & 6 Vict. c. 106, was duly considered by the Board of

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had been supplied to him, and he had no authority to sell and issue such a license. The proposed draft eel-net, if licensed and used, would capture every kind of fish frequenting the waters of the district, including all kinds of fry and immature fish.

Richard Johnston, the prosecutor, had made an affidavit in reply, in which he submitted that Edward A. O'Neill, and the trustees of John O'Neill, the lessees of the eel fisheries who had intervened in the matter, had not such a legal interest as to entitle them to prevent him obtaining the license. He added that from time immemorial Lough Neagh had been fished for eels with various implements other than the draft-nets now first applied for. Subject to the provisions of the various statutes in that regard made and provided, and to the control of the Fishery Commissioners, now the Department of Agriculture, Lough Neagh had been used as a public and common navigable inland sea in which there was a public right of fishing. The lessees only got the eel fisheries in Lough Neagh under colour of a lease dated 16th July, 1905. Prior to that date their right to a several fishery was confined to the River Bann. It was not true that Lough Neagh had been used as a preserve for eels. The Lough was about twenty-four miles long, and twelve miles broad, and contained over 100,000 acres. Steamers plied on it, and it could no more be said to be a "preserve for eels" than any other lough or estuary of the sea. The autumn was the only time when it would pay fishermen to use draft-nets for eels, and at that time there would be no fry or young fish to kill, for the fry did not come down from the spawning beds until the month of April to the beginning of June. Moreover, in the regulations prescribing the size of the meshes of nets in inland waters, there was an express exception as to nets for taking eels by section 66 of the 5 & 6 Vict. c. 106, which might be used with a false bottom, that was where the tail of the net consisted of meshes as small as from $\frac{3}{4}$ to $\frac{7}{8}$ of an inch.

By section 13 of the 11 & 12 Vict. c. 92, the Conservators were empowered to fix and determine, subject to the approval of the Department, the amount of license duty to be paid for every engine, net, instrument, weir or device, set forth in the schedule to the Act, used for the taking of salmon, trout, pollen, or fish of the

had been advised that the resolution to license draft-nets for eels was *ultra vires*, and the proposed net illegal, and cautioning the Conservators against issuing it. On the 2nd September, 1905, the General Committee of the Board, appointed for the purpose of considering any matters of urgency, passed a minute that English should be ordered not to issue draft-net licenses for eels until after the half-yearly meeting in the following November, when the matter would be discussed by the Board. On the 7th September, 1905, the prosecutor, Richard Johnston, attended before Andrew King, who was the person appointed by the Conservators to distribute the licenses. He tendered the sum of £3, being the amount of license duty appointed to be paid for the license, but Andrew King informed him that the Conservators had resolved not to issue any such licenses this season.

Andrew King made an affidavit in which he said that Lough Neagh and the Lower Bann were well-known eel fisheries, and large quantities of eels were taken and sent to the English and other markets yearly. There was no prescribed close season for fishing for eels otherwise than by fixed engines, in respect of which the close season was regulated by sect. 31 of 5 & 6 Vict. c. 106, and extended from the 10th January to the 1st July. In the Coleraine district the month of June had, by a by-law, been added to the open season. Under by-laws it was illegal to use any draft-net for the capture of pollen within Toome Bay, or to use any draft-net for the capture of salmon or pollen within half a mile of the mouth of any river flowing into Lough Neagh. There was no provision to prevent eel nets, if licensed, being used within this area, and an eel draft-net, if licensed, could, so far as the Conservators were concerned, be used in any and every lake and river in the district during the entire year. The fishing net allowed to be used for the capture of salmon and trout in inland rivers and lakes as provided by the Fishery Laws was $1\frac{3}{4}$ inches from knot to knot, and the size of mesh of draft-net for pollen was $\frac{5}{7}$th of an inch. The mesh of the draft-net claimed to be licensed and proposed to be used by the prosecutor in Lough Neagh was very small, measuring from $\frac{3}{8}$ to $\frac{1}{2}$ inch from knot to knot. The reason King gave in his affidavit for refusing the license to prosecutor was that he could not issue same to him, as none such

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had been supplied to him, and he had no authority to sell and issue such a license. The proposed draft eel-net, if licensed and used, would capture every kind of fish frequenting the waters of the district, including all kinds of fry and immature fish.

Richard Johnston, the prosecutor, had made an affidavit in reply, in which he submitted that Edward A. O'Neill, and the trustees of John O'Neill, the lessees of the eel fisheries who had intervened in the matter, had not such a legal interest as to entitle them to prevent him obtaining the license. He added that from time immemorial Lough Neagh had been fished for eels with various implements other than the draft-nets now first applied for. Subject to the provisions of the various statutes in that regard made and provided, and to the control of the Fishery Commissioners, now the Department of Agriculture, Lough Neagh had been used as a public and common navigable inland sea in which there was a public right of fishing. The lessees only got the eel fisheries in Lough Neagh under colour of a lease dated 16th July, 1905. Prior to that date their right to a several fishery was confined to the River Bann. It was not true that Lough Neagh had been used as a preserve for eels. The Lough was about twenty-four miles long, and twelve miles broad, and contained over 100,000 acres. Steamers plied on it, and it could no more be said to be a "preserve for eels" than any other lough or estuary of the sea. The autumn was the only time when it would pay fishermen to use draft-nets for eels, and at that time there would be no fry or young fish to kill, for the fry did not come down from the spawning beds until the month of April to the beginning of June. Moreover, in the regulations prescribing the size of the meshes of nets in inland waters, there was an express exception as to nets for taking eels by section 66 of the 5 & 6 Vict. c. 106, which might be used with a false bottom, that was where the tail of the net consisted of meshes as small as from $\frac{3}{4}$ to $\frac{7}{8}$ of an inch.

By section 13 of the 11 & 12 Vict. c. 92, the Conservators were empowered to fix and determine, subject to the approval of the Department, the amount of license duty to be paid for every engine, net, instrument, weir or device, set forth in the schedule to the Act, used for the taking of salmon, trout, pollen, or fish of the

salmon kind, and for the taking of eels in such district, and for every engine, &c., for any such purpose, which might be proposed to be used, and which was not enumerated in the schedule. One of the classes mentioned in the schedule was "draft-nets, or seines," £3. Mr. Devlin's application was under section 21 of the same Act, which provided that for any engine, instrument, net, weir, or device whatsoever not enumerated in the schedule to the Act, the Board of Conservators of the district may fix and determine the license duty, on payment of which, same may be issued in such district, regard being had as far as practicable to the relative capability of capture and productiveness of same as compared with those set forth in the schedule. And then it provided that the description of the net shall be furnished to the proper authority. Section 28 provided that the year for which such license shall issue, and the name, number, or letter, describing the district, and the electoral division for the purpose of the Act in which the license shall be issued, and the name of the engine, &c., for which same shall be issued, shall be printed in clear and legible characters.

Gordon, K.C., and *Kerr* (with them *Healy, K.C.*), for the prosecutor:—

By sect. 31 of the 11 & 12 Vict. c. 92, "all persons whosoever demanding to purchase any such licenses, and tendering to any person so appointed to distribute the same, the amount of license duty for the time being to be paid under the provisions of this Act, shall be entitled to receive the same without any question or objection whatsoever, arising either from the time when, the purpose for which, or the right in virtue of which, he or they may desire to use such license, or on any other grounds whatsoever." The license is in existence, and the prosecutor has tendered the license duty. Under these circumstances he is entitled to receive the license under the mandatory words of the section. That he cannot rely on the license as a justification if he has no right to fish there, or if he uses an illegal instrument, is perfectly plain from the proviso—"Provided always that nothing herein contained with reference to the possession of any such license, or the payment of the license duty, or rates

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under the Act, shall be construed to give or confer any right of fishing, or of using any instrument or device for taking fish by any means, or in any place, which the party having or using such license would not have possessed if this Act had not been passed, or to alter or affect the rights of any other persons."

What the Conservators did by their resolution of 6th May, 1905, was to fix a license duty of £3 upon "an eel draft-net." They added two qualifications which, in the opinion of the Department, were incapable of being set out on the face of the license, namely—(1) as to limiting time of the license from the 1st July to the 31st October of each year; and (2) of confining the use of such license to Lough Neagh. Section 28 of the 11 & 12 Vict. c. 92 sets out what must appear on the face of the license, viz., "the year for which license shall issue, and a name, number, or letter, describing the district and electoral division for the purposes of this Act, in which the license shall be used, and the name of the engine, net, instrument, or device for which same shall be issued, shall be printed thereon in clear and legible characters." Restrictions as to time or place can only be added by by-law (see sect. 14 of 8 & 9 Vict. c. 108, and sect. 91 of 5 & 6 Vict. c. 106). The Conservators had no power to make these restrictions, and, therefore, the Department, for these two reasons, were right in requiring them to be deleted from the form of the license. When these deletions were made, the license conformed in all respects to the requirements of section 28 of 11 & 12 Vict. c. 92, and when the Department formally "prescribed and adopted" the form of license, and published same in the Gazette on August 11, 1905, the peremptory duties set out in sections 30 and 31 of 11 & 12 Vict. c. 92 fell upon the Conservators and their officers appointed to sell such license. The words of these sections are words of "imperious duty." The Conservators *must* do what is thereupon directed that they should do, namely, that the licenses should be "publicly sold" (sect. 30) to "all persons whomsoever demanding to purchase any such licenses, and tendering the amount of license duty" (sect. 31), and all discretion or right to refuse same is absolutely taken away from the Conservators.

It will be contended that the Conservators meant to license a

particular net, and that the Department issued a general license for any "draft-net for the capture of eels." The Department, in the first place, did what sect. 28 of the 11 & 12 Vict. c. 92 directed and empowered them to do. They did not "prescribe or adopt" any particular form of net; but they did "prescribe and adopt" the form of the license for a draft-net for the capture of eels. This distinction does away with the contention that the "Conservators meant one net, and the Department licensed another." The Conservators, after full debate of the matter, and after due consideration of sections 66 of 5 & 6 Vict. c. 106, and 11 of 8 & 9 Vict. c. 108, fixed the license duty for a "draft-net for the capture of eels," and the Department prescribed and adopted the form of license for a "draft-net for the capture of eels." That the Conservators added two restrictions which the Department deemed improper to appear on the face of the license, and which in law and in fact were *dehors* the duty of the Conservators, does not give rise to any inconsistency.

The Conservators must be deemed to be aware of the provisions at the end of sect. 31 of 11 & 12 Vict. c. 106. They must have debated the question of the legality of the size of the meshes, and the authorisation of a "false bottom" in eel nets. They are not to be deemed as licensing an illegal net, but a legal net. All they have done is to fix the license duty for a "draft-net for the capture of eels." That is a legal net. The Conservators refused the prosecutor what the law has declared him entitled to "without any question or objection whatsoever." They have disobeyed the statute, and the prosecutor is entitled to a mandamus.

We object to the interveners being heard. They have no *locus standi*. What they are afraid of is that, as the eel fisheries in the Lough are claimed under a patent of Charles 2, if we get a license, they may meet with the same fate that was met with in *Bristow* v. *Cormican* (1). It was there practically decided that the patent was invalid because it was said that the Crown had no title to the soil of an inland lake where the tide did not ebb and flow, and the Crown could not give by patent that to which it had no title itself. See judgment of Lord Blackburn, at p. 667.

(1) 3 A. C. 641.

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Henry, K.C., and *Hanna*, for the Coleraine Fishery Conservators:—

The resolution that led to the Department being put in motion was a resolution of the 6th May, 1905, that a license duty be fixed on an eel draft-net for Lough Neagh, to be used from the 1st July to the 31st October in each year, both days inclusive. There was a limit as to time and a limit as to place in that resolution. The Agricultural Department did not adopt that, but passed a license of a perfectly sweeping character, not limited as to place, and not limited as to time. There are at present draft-nets for salmon with the ordinary mesh fixed by statute. An application was made to the Privy Council to legalise a draft-net for pollen, and it was opposed on the ground that there was no use in having restrictions as to salmon nets if the lake was to be swept with pollen nets. The Privy Council by by-law legalised a draft-net for pollen, provided that it should not be used within half a mile from the mouth of the river, that is to say, in the corner known as Toome Bay. But this net could be used anywhere, and would render the by-law useless. Toome Bay would be closed to the pollen fishermen but open to the eel fishermen with a very much smaller mesh. The prosecutor says that he only wants the license, and nothing more. If that is so, he can have a license for a draft-net *simpliciter*, on payment of a duty of £3. But he cannot get a license for a net with a false bottom for the capture of eels, because the result of that would be to make all other legislation futile and nugatory. The object of the prosecutor here is to establish that a draft-net for eels carries with it a false bottom. Sect. 11 of 8 & 9 Vict. c. 108, which reduces the size of the mesh from $2\frac{3}{4}$ inches in the earlier section to $1\frac{3}{4}$ inches, repeals the earlier section (5 & 6 Vict. c. 106, sect. 66). The exception in favour of nets for the taking of eels in the earlier section is not repeated in the later section, and, therefore, we contend that that exception is done away with, and that there is now no authorization to use a false bottom with a net for the capture of eels. If the prosecutor wants to use a false bottom, he can use one with a legal mesh. Where is there any warrant for a false bottom with any other mesh? If the prosecutor's contention is right, he could use a false bottom of canvas. No justification can be found in

sect. 66 (5 & 6 Vict. c. 106) for the use of a net of the description intended to be used here. If you take sect. 66 alone before the repealing section, it never authorized meshes of this size. When you look at sections 11 and 12 of 8 & 9 Vict. c. 108, it is plain that the object of the Legislature was, instead of allowing a particular fisherman to take a false bottom and fix the size of the mesh for himself, to give to the Department authority to avoid injustice by altering the mesh in any locality.

Ronan, K.C., and *Vesey FitzGerald, K.C.* (with them *Gaussen*), for Edward O'Neill and the trustees of John O'Neill, the lessees of the Toombridge Eel Fishery intervening :—

Under 11 & 12 Vict. c. 92, s. 28, the Department are to prescribe the form, but they have no power to prescribe the substance. Here they did prescribe the form, but it was not a form for the license that was approved of by the Conservators. The license prescribed by the Department was for the entire year, which would be three times as long (and, therefore, more productive) as the one upon which the Conservators assessed the license duty. The Department can make an order altering the close time, or altering the size of the mesh, but their only jurisdiction in reference to the license is as to form. The license which is sought now is a £3 license for a draft-net for the entire year for the entire district. The Conservators have never fixed any license duty for that. Can it possibly be said that the Conservators when they fixed £3 only for Lough Neagh, and only for four months, were determining the proper fee for the whole district, and for the whole year. By section 13 (11 & 12 Vict. c. 92) the Conservators are to "fix and determine, subject to the approval of the Department, the amount of license duty to be paid," subject to the limits in the schedule. Under that the Department can veto the duty, but they cannot substitute another duty themselves. Take No. 4 in the schedule to the Act, "draft-nets or seines." That is not a draft-net or seine for any particular kind of fish. It is a draft-net or seine generally. In No. 6 we have specified "draft-nets for pollen," and that is a different maximum. But there is no suggestion of a draft-net to be used only for salmon, or to be

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used only for eels, or to be used only for trout. There are two licenses for draft-nets, and if it is a draft-net, otherwise than a draft-net for pollen, it is enough. It has been assumed that No. 4 in the Schedule is a draft-net for salmon, but, as a matter of fact, a draft-net or seine license does not mention the fish. If a man has a license of that description, he cannot be prosecuted for fishing for eels without a license because he has a license, and he cannot be prosecuted for putting a false bottom on a net, if he uses it for fishing for eels. Section 66, 5 & 6 Vict. c. 106, does not make it a separate engine at all, but it says that you shall not, except when you are fishing for eels, use a false bottom. If you have a license, and you fish for salmon with a false bottom, you are convicted, not for fishing without a license, but for putting on the false bottom. A corresponding prohibition does not extend to fishing for eels. If these nets are authorised, acts of piracy may be committed in all parts of Ireland from one end of the year to the other, there being no close season for eel nets—only for fixed engines. The Court will not in its discretion compel the Conservators to sell a license which, as we contend, authorized an illegal engine, viz., the net in King's report. They cannot authorize that by a license—only by a by-law. In the alternative, we say that the Court will not compel the Conservators to issue a license for a net which they have never approved of either as to area or to time, and at a duty which they never approved of, for the duty which they approved of was for a wholly different net, no by-law having been passed limiting the area within which it may be used.

Kerr, in reply :—

It is contended that section 66 of the 5 & 6 Vict. c. 106 has been "superseded." It is also urged that section 11 of the 8 & 9 Vict. c. 108, in fixing the $1\frac{3}{4}$ inch mesh repeals all section 66, including the "exception" mentioned in the latter section as to the authorization of the "false bottom" in a net for the capture of eels. Manifestly both these contentions are wrong, because the opening words of section 11 of 8 & 9 Vict. c. 108 refer to the fact that the size of mesh fixed by section 66 of the 5 & 6

Vict. c. 106 has been found to be too wide. All that section 11 of the amending Act does is to reduce the mesh to 1¾ inches. It cannot be the true meaning of the amendment that the reduction in size of mesh is a *quid pro quo* for withdrawing the right to use a "false bottom" in a net which is to be used solely for the capture of eels.

The Conservators and the interveners here say that the issue of the license would lead to "piracy," and that the fishermen would "sweep the Lough" of eels. That is no excuse to avail against the section of the statute. If any illegality occurs, there is a remedy. The proviso at the end of section 31 saves all the rights which the Conservators or the interveners have against any wrong-doer. Furthermore, the Department can step in under its by-laws and prohibit the use of any net or instrument at any time or place (section 91 of 5 & 6 Vict. c. 106, and section 14 of 8 & 9 Vict. c. 108).

WRIGHT, J.:—

Nov. 22.

In order to make clear the grounds of my decision in this case, which is an application for a writ of mandamus, directed to the Board of Conservators of the Coleraine District of Fisheries, commanding them to cause a license for the use of draft-nets for the capture of eels pursuant to the provisions of the statute 11 & 12 Vict. c. 92 to be issued to the prosecutor, it is necessary to refer shortly to the provisions of several sections of the Fishery Acts, which were discussed in the course of the argument.

The size of the mesh for nets to be used in inland rivers or lakes was by section 66 of the earlier Act, the 5 & 6 Vict. c. 106, fixed at 2¼ inches from knot to knot; but by section 11 of the 8 & 9 Vict. c. 108, reciting that it had been found that the size of the meshes of all nets to be used in the inland and fresh-water portions of rivers, as fixed and prescribed by the earlier Act, was too large, and permitted large quantities of valuable fish to escape, the size of the mesh was fixed at 1¾ inches, and it was provided that no mesh should be used in the inland and fresh-water portions of rivers and lakes of less size than 1¾ inches from knot to knot. It was argued that this section 11 of 8 & 9 Vict. c. 108 repealed the provision in

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section 66 of the earlier Act, 5 & 6 Vict. c. 106, allowing a false bottom to be used in nets for taking eels. I may state that, in my opinion, the later section does not repeal this provision in the earlier one, that, in fishing for eels with nets, a false bottom may be used, but I do not consider it necessary for the purpose of the present case to decide this point. The size of the mesh thus fixed in 1845 at $1\frac{3}{4}$ inches from knot to knot has ever since so remained, and could only be altered, formerly by the Fishery Commissioners, now, by the Department of Agriculture and Technical Instruction for Ireland, in and for any particular district and locality, *by by-law* made under the express power conferred on them by section 12 of 8 & 9 Vict. c. 108, in addition to the general powers of making by-laws contained in section 91 of the 5 & 6 Vict. c. 106. The issuing of licenses for the different kinds of engines and nets, &c., for taking salmon and eels is regulated by 11 & 12 Vict. c. 92, and that Act further provides for the formation of fishery districts and the election of Boards of Conservators for the several districts by the persons who have paid license duty. By section 13 each Board was empowered to fix and determine from time to time, subject to the approval of the Fishery Commissioners, the amount of license duty to be paid in each year for every engine, net, &c., set forth in the schedule to the Act. The schedule in question contains a list of several engines and nets used in salmon, trout, pollen, or eel fisheries in districts, and the amount of license duty payable in respect of each. No. 4 is "draft-nets or seine," and No. 8 "other nets or similar engines not named above," in respect of which "the license duty shall be fixed by the Commissioners or Conservators as provided by the Act." The reference here is to sect. 21 of the Act (11 & 12 Vict. c. 92), which must be carefully considered. The application in the present case is for a mandamus to compel the Conservators to issue a license for draft-nets for eels to the prosecutor in accordance with the provisions of this Act. The power to fix and determine the license duty for any engine or net not enumerated in the schedule to section 13, is conferred by this section 21, and the procedure for that purpose is carefully and exactly prescribed in and by the section. Prior to the present year, it is certain that no such license as is now sought for was ever issued in the Coleraine Fishery district; but applica-

tion, under the 21st section, was made by a Mr. Devlin, one of the Conservators, in April of this year by the following notice of application to Mr. English, Clerk, and Mr. King, Inspector, of the Fishery Board.

"21*st April*, 1905.

"DEAR SIR,—Will you please place on agenda paper for first meeting the following notice:—'That I now make an application to this Board to fix a license on an eel draft-net for Lough Neagh, in accordance with the powers vested in said Board by Act of Parliament, 11 & 12 Vict. c. 92, s. 21.' I trust you will have minute-book and all papers bearing on the subject at the meeting.

"Yours, &c.,

"JOHN DEVLIN, Jun.

"THOS. J. ENGLISH, ESQ."

"21*st April*, 1905.

"DEAR SIR,—You being an Inspector of Fisheries, I beg to give you notice that I intend using an eel draft-net in Lough Neagh on the 1st day of June, and I have made an application to the Board of Conservators for said Board to fix a license on same. For your information I should say that the eel draft-net that I propose using shall be much the same as a pollen draft-net, and its capabilities of capture shall be about the same. This notice is served in accordance with the Act of Parliament, 11 & 12 Vict. c. 92, s. 21. Hoping you will consider this ample notice,

"Yours, &c.,

"JOHN DEVLIN, Jun.

"Mr. A. KING,

"Inspector of Fisheries."

On receiving this notice, it became the duty of King, the Board's Inspector, under this same section 21, to forward to the Conservators a description of the proposed new net as to *its relative capabilities of capture*, as compared with the engines and nets set forth in the schedule to the Act; and accordingly King sent in his report, which is as follows:—

"In accordance with the provisions of section 21 of the 11 & 12 Vict. c. 92, I beg to submit the following report for your information. The net referred to is about 110 yards long, and 30 feet deep, having a tail or bunt of about 10 yards, and is

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exactly the same as the draft-net now in use for the capture of pollen with one exception, and that is that a portion of the tail would be composed of very small meshes, measuring from $\frac{3}{8}$ to $\frac{1}{2}$ inch from knot to knot. This would be used from a boat as a hand or draft-net.

"The capabilities of capture would be equal to that of a coghill net on which a license duty of £3 is fixed. This net shall be known as the eel draft-net, and shall be designated as such. I may add that the above is a correct description of the net which Mr. Devlin proposes to use for the capture of eels."

It will be observed that the draft eel net for which a license was sought was to be exactly the same as the draft-net then in use for the capture of pollen, with the exception that part of the tail would be composed of very small meshes, measuring from $\frac{3}{8}$ to $\frac{1}{2}$ an inch. The size of the mesh for the pollen net has been fixed by the by-law at $\frac{6}{7}$ of an inch. Devlin's application was, therefore, in effect for a draft eel-net, with the size of the mesh reduced from $1\frac{3}{4}$ inches to $\frac{6}{7}$ of an inch, as to the greater part of the net.

This application came before the Conservators at their half-yearly meeting at Coleraine on the 6th of May, when the following resolution was carried on a division :—

"Proposed by Mr John Devlin, junr., seconded by Mr. A. Corr :—That a license be fixed on an eel draft-net for Lough Neagh, such net to be used in Lough Neagh from the 1st July to the 31st October in each year, both days inclusive."

There is no close season for the capture of eels by draft-nets, the only close season for the capture of eels being under section 31 of the 5 & 6 Vict. c. 106, where they are being fished for by fixed nets or engines.

The resolution of the Board of Conservators practically imposed a close season on eel fishing carried on by draft-nets, and, as I read it, having regard to Devlin's application and the Inspector's report, it purported to sanction the use of a draft-net, and to fix the license duty for the use of such draft-net for eel fishing, the mesh of which was to be about half the size that the law prescribed.

The power to authorise the use of an engine or net outside

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exactly the same as the draft-net now in use for the capture of pollen with one exception, and that is that a portion of the tail would be composed of very small meshes, measuring from $\frac{3}{8}$ to $\frac{1}{2}$ inch from knot to knot. This would be used from a boat as a hand or draft-net.

"The capabilities of capture would be equal to that of a coghill net on which a license duty of £3 is fixed. This net shall be known as the eel draft-net, and shall be designated as such. I may add that the above is a correct description of the net which Mr. Devlin proposes to use for the capture of eels."

It will be observed that the draft eel net for which a license was sought was to be exactly the same as the draft-net then in use for the capture of pollen, with the exception that part of the tail would be composed of very small meshes, measuring from $\frac{3}{8}$ to $\frac{1}{2}$ an inch. The size of the mesh for the pollen net has been fixed by the by-law at $\frac{6}{7}$ of an inch. Devlin's application was, therefore, in effect for a draft eel-net, with the size of the mesh reduced from $1\frac{3}{4}$ inches to $\frac{6}{7}$ of an inch, as to the greater part of the net.

This application came before the Conservators at their half-yearly meeting at Coleraine on the 6th of May, when the following resolution was carried on a division :—

"Proposed by Mr John Devlin, junr., seconded by Mr. A. Corr :—That a license be fixed on an eel draft-net for Lough Neagh, such net to be used in Lough Neagh from the 1st July to the 31st October in each year, both days inclusive."

There is no close season for the capture of eels by draft-nets, the only close season for the capture of eels being under section 31 of the 5 & 6 Vict. c. 106, where they are being fished for by fixed nets or engines.

The resolution of the Board of Conservators practically imposed a close season on eel fishing carried on by draft-nets, and, as I read it, having regard to Devlin's application and the Inspector's report, it purported to sanction the use of a draft-net, and to fix the license duty for the use of such draft-net for eel fishing, the mesh of which was to be about half the size that the law prescribed.

The power to authorise the use of an engine or net outside

those set forth in the schedule is given to, and is to be exercised by, the Conservators, not by the Fishery Commissioners formerly, or now by the Department of Agriculture. The Conservators are set in motion by a proposal to use a new engine or net, notice of which must be given to their officer, and upon which their officer, the Inspector, is to report, and on that report they, the Conservators, "may authorise the use of the same," that is, the proposed new engine or net. This, Devlin's, is the only application for a draft eel net, and this resolution of the 6th of May is the only resolution that I can find on the evidence, authorising the granting of a license for a draft eel net to be used in this fishery district.

The functions of the Department of Agriculture and Technical Instruction are wholly different, and are under section 28 of the 11 & 12 Vict. c. 92. It is for them to settle the form of the license in all cases, including the case of new engines and nets applied for, and authorised by, the Conservators under sect. 21. Their function is more ministerial, and follows on the action of the Board of Conservators. The resolution of the Conservators was communicated to the Department by letter of the 17th May, as follows:—"I beg to inform you that at the half-yearly meeting of the Board of Conservators, held in the Courthouse, Coleraine, on Saturday, the 6th inst., it was resolved that a license should issue for draft-net for the capture of eels in Lough Neagh, such net to be used from 1st July to 31st October in each year, both days inclusive, and that the license duty for each net be £3 per year. Attached hereto you will find copy report of Andrew King, Inspector of Fisheries for the district, describing the net and its capabilities of capture. I also enclose a draft of the license intended to be used for such net for approval."

And then followed a correspondence, in which objections are made to the new eel-net proposed to be licensed, and to the form of the draft license, and in August a license was issued by the Department, and published in the *Gazette*, which license is for the whole year, and is silent as to the size of the mesh to be used. If this license means that under it eel-fishing by draft-net may be carried on throughout the whole year, and is not to be confined to the four months from July to October, and that the mesh is to be of the legal size, namely, 1¾ inches, it is something wholly

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different from that applied for by Devlin, reported on by King, and authorised by the resolution of the Conservators. They never entertained any such application; no such application was ever before them; and they are the only body who can entertain and authorise it.

The resolution of the Conservators, if it authorised the use of an illegal net, as, in my opinion, having regard to the application before them, it purported to do, illegal by reason of the reduced size of the mesh—a matter entirely outside the province of the Conservators—is wholly void; and once the resolution falls as being illegal, the license issued by the Department founded upon that resolution must fall with it.

But reliance has been placed on section 31 of the 11 & 12 Vict. c. 92, which is certainly very wide in its terms:—"And be it enacted, that all persons whosoever demanding to purchase any such licenses, and tendering to any person so appointed to distribute the same the amount of license duty for the time being to be paid under the provisions of the Act, shall be entitled to receive the same without any question, or objection, whatsoever, arising either from the time when, the purpose for which, or the right in virtue of which, he or they may desire to use such license, or on any ground whatsoever; provided always, that nothing herein contained with reference to the possession of any such license, or the payment of the license duty, or rates under this Act, shall be construed to give or confer any right of fishing, or of using any instrument or device for taking fish by any means, or in any place, which the party having, or using, such license would not have possessed if this Act had not been passed, or to alter or affect the rights of any other persons."

I read this as declaring in the strongest and most comprehensive terms that once a legal license has been issued, it cannot be refused to anyone asking for it and tendering the amount of license duty. No objection can be founded either on the time when, the purpose for which, or the right in which, he desires to use the license, or on any other grounds whatsoever; but this section must, in my opinion, apply to a legal license duly authorized. The license now asked for, and the granting of which the Court is asked by mandamus to compel, is one which was

never authorized by, or adopted by, the Board of Conservators. The only license ever applied for before them and authorized by them was that applied for by Devlin, which was, in my opinion, illegal.

I, therefore, think the application ought to be refused.

MADDEN, J.:—

The prosecutor seeks a mandamus directed to the Conservators of the Coleraine Fishery district, commanding them to cause a license to be issued to him for the use of a draft-net for the capture of eels, pursuant to the provisions of 11 & 12 Vict. c. 92.

A draft-net, for the capture of eels, is not among the engines enumerated in the schedule to this statute. It is no doubt a draft-net; but if a net of this kind is used for the capture of eels, it is constructed with what is called a false bottom. This is a kind of bag or enclosure into which the fish find their way while the net is hauled. In the net produced in Court it is composed of a much closer net than the net of the draft-net. But the essence of the net consists in the bag-like enclosure, by means of which the fish when entering it find beneath them, not the bottom of the lake, but a bottom of close net-work. Under the 66th section of 5 & 6 Vict. c. 106, it is enacted that no person shall make use of, or fish with, any such net (that is, haul or draft-net, or seine) formed with a false bottom except nets for the taking of eels.

The reason why eel nets are exempted is obvious. The habitat of the eel is the bed of the lake. "The bed of eels" may be shaken by thunder, but its inhabitants will quickly return. It is when the eel, in obedience to a mysterious instinct, leaves this "eel bed" to pay a visit to the sea from which it never returns that it falls a victim to the weir and to the net. Other fish, when struck by the net, rush wildly about under water and are captured in the meshes. But the eel, in obedience to its nature, re-seeks the bottom of the lake, and even if it should fail to penetrate it, the draft-net, devoid of false bottom, will almost infallibly pass over its slippery body.

The section from which I have quoted contains another provision fixing the minimum opening of the mesh at 2¼ inches from knot to knot. This was subsequently changed to 1¾ inches (8 & 9

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Vict. c. 108, sect. 11). But the later Act does not, in my opinion, affect the exemption in favour of eel nets to which I have referred, which is a matter conversant with the construction of the net, irrespective altogether of the size of the mesh.

I am clearly of opinion that a draft-net for eels is something different from a draft-net *simpliciter*, inasmuch as it may lawfully be constructed with the needful false bottom, and that it comes within the 8th item in the schedule to the 11 & 12 Vict. c. 92 in these terms—"Other nets, or similar engines not named above," subject to "license duties such as shall be fixed by Commissioners or Conservators as provided by this Act."

Turning to the provisions of this Act, it is enacted by the 8th section that all engines, nets, &c., for the taking of fish of the salmon and trout kind, or for the taking of eels, shall be duly licensed and rated in the manner prescribed by the Act. The 28th section requires that "a separate license shall be issued for each separate engine, net, instrument, or device, for taking fish."

It prescribed certain particulars which must appear in clear and legible characters upon the face of the license. I do not enter into those particulars, for I am of opinion that the license, so settled by the Department of Agriculture, is in accordance with the requirements of the statute.

The net in question not being one of the engines specified in the schedule to the Act, the procedure for the purpose of obtaining a license for such an engine in the Coleraine district must next be considered. This procedure is regulated by the 21st section, which empowers the Board of Conservators "to fix and determine the license duty on payment of which the same may be used in such district, regard being had, as far as practicable, to the relative capability of capture and productiveness of the same, as compared with those set forth in the said schedule, and the relative proportion of the duties therein set forth." It provides that the party proposing to use any such engine or net not enumerated in the schedule, is to give notice to one of certain persons, including an inspector appointed under the Act, of his intention to use the same. The person so notified, in this case the inspector, is required to forward to the Conservators "a description thereof as to its relative capability of capture, as compared with the engines, &c., set forth

in the said schedule, and shall furnish the name by which it shall be designated, upon which the . . . . Conservators . . . . may authorize the use of the same upon payment of the license duty which they may fix, and cause the same to be inserted in the schedule of licenses for the said district."

It rests with the Conservators, and not with the Department of Agriculture, to authorize the use of the proposed net. It also rests with them to fix the amount of the duty, subject, in this matter, to the approval of the Department (11 & 12 Vict. c. 92, sect. 13). This having been done, the Department are to prescribe the form of the license, which, as I have already mentioned, is to contain certain specified statements. But the authorization of the particular net or engine rests with the Conservators, and the Department has no control over their action in this matter.

What, then, is the net authorized by the Conservators? The decision of the case depends on the answer to this question. The prosecutor says that the Conservators simply authorized a draft-net for taking eels, that the form of the license has been duly prescribed by the Department, and that he is entitled, under the provisions of the 31st section of the Act, on tendering the amount of the duty, to obtain the license in the prescribed form without question asked or objection taken.

On the other hand, it is contended that the Conservators by their resolution authorized the particular kind of net specified in the inspector's report submitted to the Conservators in pursuance of the 21st section, and that in so doing they acted *ultra vires*, with the consequence that the resolution based upon this report, and the license settled by the Department in pursuance of the resolution, are both invalid. They contend, in my opinion rightly, that the mandatory provisions of the 31st section apply to a license lawfully authorized for some specific engine, and not to one for the issue of which there is no lawful authority. This is the attitude of the existing Board of Conservators, who have been advised that the resolution passed by their predecessors is *ultra vires*, and we have been assisted by the counsel on behalf of the owners of the eel fisheries on the River Bann, who are interested in the prevention of illegal netting in the lake. The intervenients would have a right, if their contention is right, and if the Conser-

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vators had persevered in an illegal course, to bring an action in the Chancery Division to restrain persons from illegal netting in the lake, and to restrain the Conservators from putting an illegal resolution into force by the issue of licenses. Having regard to the extent to which their proprietary rights may be affected, they have, in my opinion, a *locus standi* which entitled them to be heard in this Court.

In order to consider what was the net actually authorized by the Conservators, I turn to the report of the inspector, Andrew King, submitted for their information under the provisions of the Act. "The net referred to is about 110 yards long, 30 feet deep, having a tail or bunt of about 10 yards, and is exactly the same as the draft-net now in use for the capture of pollen, with one exception, and that is, that a portion of the tail is composed of very small meshes measuring from $\frac{3}{8}$ to $\frac{1}{2}$ inch from knot to knot. This net would be used from a boat, as a haul or draft-net. The capabilities of capture would be equal to that of a coghill net on which a duty of £3 is fixed. This net shall be known as the eel draft-net, and shall be designated as such. I may add that the above is a correct description of the net which Mr. Devlin proposes to use for the capture of eels."

It is to be observed that the particular matter in respect of which a description of the proposed net is required by the statute from the inspector is "its relative capability of capture" as compared with the scheduled engines; and I need hardly add that the capability of capture of a net depends largely on the size of the mesh. This is fully noticed by Mr. King, whose report is perfectly clear on this point.

It is to my mind clear that no resolutions of the Board of Conservators could lawfully authorise the use of a net with meshes of less size than is prescribed by the 11th section of the 8 & 9 Vict. c. 108. The section prohibits and penalises the use of such a net in the clearest terms, "save as hereafter provided." This saving clause relates to the next succeeding section, the 12th, which empowers the Commissioners, now represented by the Department, by a by-law, duly made, to alter the size of the meshes of nets for any particular district or locality. This was done in the case of the pollen nets referred to by Mr. King,

by a by-law approved by the Lord Lieutenant and Privy Council on the 12th of October, 1895, as the result of a public inquiry defining the length of a pollen net, and the size of the mesh, and prohibiting the use of a draft-net for the capture of pollen within certain limits—including the distance of half a mile from the mouth of any river flowing into the lake, evidently for the protection of the salmon and trout fisheries. The net specified in the report of the inspector, and produced before us in Court, is obviously more destructive than the pollen net. I am aware that the resolution of the 6th of May in terms purports to legalize an eel draft-net. If this means an eel net with the statutory mesh, it is a different engine from that described in the statutory report on which the resolution is founded. Of course the Conservators never intended to do anything so futile as to authorise so worthless an engine of capture as an eel draft-net, the mesh of which would not be less in any part, including the false bottom, than $1\frac{3}{4}$ inches from knot to knot. Accordingly, I find that they sent to the Secretary of the Department the report of Andrew King, describing the net and its estimated capabilities of capture. The correspondence which ensued is not of much importance, but I note that the Department warned the Conservators that a draft-net with a mesh smaller than that prescribed by the statute could not be used for the capture of fish other than pollen. Finally the Department settled a license in the statutory form. This would be the same, irrespective of the dimensions of the net or of the meshes authorized by the Conservators.

The question for our decision is, whether we ought to direct the Conservators to issue a license for an illegal engine. It is not pretended that the net specified in King's report and authorized by the Conservators is a legal net. But it is contended that the whole matter has been closed by the settlement of the license, and that under the provisions of the 31st section of 11 & 12 Vict. c. 92, any person tendering the amount of license duty is entitled to receive a license so settled "without any question or objection whatsoever, arising either from the time when, the purpose for which, or the right in virtue of which, he or they may desire to use such license, or any other grounds whatsoever." Notwithstanding the generality of the concluding words, all those provisions, in my

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opinion, point to the position of the licensee, who has an unquestionable right to obtain any license that can be lawfully issued by or on behalf of the Conservators without question asked. But we are at present dealing with the Conservators, and if I be right in concluding that the net authorized by the resolution was an illegal one, it seems to me to follow that we ought not to order the issue of a license which in relation to this specific engine would be an illegal one. I cannot see that this conclusion conflicts with the rights conferred upon intended licensees under section 31, when their rights are lawfully called into existence.

LORD O'BRIEN, L.C.J.:—

At an early stage of the argument of this case I said that I thought that a net for the capture of eels was very likely not alone to capture eels, but to capture salmon and trout, and to destroy immature fish. However, a draft-net for eels is recognised by the statute—the 66th section of the 5 & 6 Vict. c. 106. I asked Mr. Henry what his case was, and he said, "This net will capture everything—salmon and trout—and destroy the young fish." However, the Conservators, for whom he appeared, sent up to the Agricultural Department a resolution sanctioning a draft-net for eels with a form of license, and the only objection the Agricultural Department made to the application was that the form sent up was not in pursuance of the 28th section of the 11 & 12 Vict. c. 92. Upon this objection being made, the Board of Conservators sent back the form altered in conformity with the suggestion of the Agricultural Department. This was adopted by the Agricultural Department, and sent back to the Conservators. It is plain to me that the Board of Conservators got the very license to be issued, the validity of which they now question. It complies with the provisions of the 28th section. It purports to be a license in the statutory form.

I adopt the argument of Mr. Gordon and Mr. Kerr, who rest their case upon the 31st section. I think they are right in their construction of that section. Here is what it says:—"And be it enacted, that all persons whosoever demanding to purchase any such licenses, and tendering to any person so appointed to distribute the same the amount of license duty for the time being to be paid

under the provisions of this Act, shall be entitled to receive the same." Was there ever anything more drastic or more peremptory than what follows? "*Without any question or objection whatsoever* arising either from the time when, the purpose for which, or the right in virtue of which, he or they may desire to use such license, *or on any other grounds whatsoever.*" I do not think language could be stronger than that. I repeat the expression "on any other grounds *whatsoever.*" Notwithstanding this most sweeping provision, it is argued that the Board of Conservators, where the license is demanded, may raise practically every possible objection under the very complicated fishery code. But let me read on: "Provided always, that nothing herein contained with reference to the possession of any such license, or the payment of the license duty or the rates under this Act, shall be construed to give or confer any right of fishing, or of using any instrument or device for taking fish by any means or in any place which the party having or using such license would not have possessed if this Act had not been passed, or to alter or affect the rights of any other persons." It was argued on the part of the applicant that it was obligatory on the Conservators to issue the license, but that if there was any unauthorised mode of fishing afterwards, it should be dealt with by prosecution. I adopt that argument. As the possession of a game license is a condition precedent to a person shooting at all, so the possession of a license to fish is a condition precedent to fishing at all; but the granting of it leaves untouched the question of illegality as to time, place, mesh, and the detailed mechanism of the instrument, or as to the rights of other persons. Once it exists in the statutory form, and is demanded, and the duty tendered, the Board of Conservators cannot refuse to grant it; but possession of it does not secure immunity for those who fish illegally. I think Mr. Ronan's client has no *locus standi* on this application; indeed we should have, in the first instance, determined this point.

J. L.

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Feb. 9, 12, 26.

The prosecutor appealed (1).

Gordon, K.C., *Healy, K.C.*, and *Kerr*, for the appellant.

Conner, K.C., and *Hanna*, for the Conservators.

Ronan, K.C., *Vesey FitzGerald, K.C.*, and *Gaussen*, for Captain O'Neill, who claimed to be the owner of a fishery in Lough Neagh, and lessee of a several fishery in the River Bann, and also a ratepayer in the fishery district, and sought to be heard in support of the decision of the King's Bench; but the Court declined to hear them.

Feb. 26.

WALKER, C.:—

The question in this case is whether the prosecutor was, on the 7th September, when he made his application, entitled to have a license for a draft-net for eels issued to him on payment of the duty of £3. The Chief Justice was of opinion he was so entitled; but Madden and Wright, JJ., were of opinion that he was not.

It is necessary shortly to refer to the legislation, in order to ascertain the then legal rights of the prosecutor.

Under the combined operation of the 66th section of the Act of 1842 and the 11th section of the Act of 1845, the *minimum* size of the mesh for eels was $1\frac{3}{4}$ inches from knot to knot, and nets for the taking of eels could be formed with a false bottom.

Under the 11 & 12 Vict. c. 92, Boards of Conservators of Fisheries for each district were created, and by the 13th section the Board were empowered to fix and determine, subject to the approval of the Commissioners of Fisheries, now represented by the Agricultural Department, the amount of license duty for every engine, net, instrument, weir, or device set forth in the schedule to the Act, used for the taking of, *inter alia*, eels within the district, and for every engine, net, instrument, weir, or device, for any such purpose which might be proposed to be used, and which is not enumerated in the schedule, provided that no license duty, or rate, to be fixed by the Conservators should exceed the respective

(1) In the Court of Appeal, before WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

amount of duty specified in the schedule. The schedule is headed —"Scale of license duties for each engine, net, instrument, or device, used in salmon, trout, pollen, or eel fisheries, in districts"; and the schedule includes "draft-nets," to which is annexed a maximum duty of £3.

As regards the other class they are mentioned as "other nets or similar engines not named above—License duties such as shall be fixed by Commissioners or Conservators as provided by this Act." A draft-net for eels is, therefore, enumerated, with a maximum license duty of £3.

The 21st section deals with the mode of fixing the license duty for any engine, instrument, net, weir, or device, not enumerated, and that 21st section plainly does not apply to draft-nets for eels, which were already in the schedule. All that could be done about those was to settle the form of the license, and fix the duty, which could be under, but could not exceed, £3.

By the 28th section the Commissioners are to prescribe the form of the license, and its essential particulars are the year, a name, number, or letter, describing the district and electoral division, and the name of the net; and the license is to be only good and valid for the year, district, and purpose for which the same shall be issued, and the 30th section provides that the licenses shall be publicly sold.

It is quite plain, so far, that there was a legal obligation on the Conservators, if so required, to have a form of license settled for a draft-net for eels, and to fix the duty therefor within the maximum, and mandamus would lie if there was a refusal to do it. This, however, is not the question we have to deal with. But it is quite plain that, when once a license has been settled as to form and duty, the provisions of the 31st section come into operation. That section is—[His Lordship read the section]. What we have to see, therefore, is whether on the 7th September, when the prosecutor applied for a license for a draft-net for eels, and tendered his £3, the Conservators were, on any legal ground, justified in refusing it to him. That they did refuse to give him the license for the draft-net for eels which he asked for is not disputed, and, on the facts, I think their alleged justification is one which the 31st section carefully excludes them from considering or entering upon.

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Was there then, in existence, within the 31st section, "such license" on the 7th September? That depends, I think, on documents and resolutions beginning in April and ending in August, 1905.

It appears that a Mr. Devlin, on the 26th April, made an application to the Board to fix at their first meeting a license on an eel draft-net for Lough Neagh, under the 21st section to which he refers, and on the same date he gave notice to the inspector of his application, and adds—"For your information, I should say that the eel draft-net that I propose using shall be much the same as a pollen draft-net, and its capabilities of capture shall be about the same." Mr. King, the inspector, made his report to the Board under sect. 21, describing the net, as 110 yards long, and 30 deep, having a tail or bunt of about 10 yards, and adds "a portion of the tail would be composed of very small meshes measuring from $\frac{3}{4}$ to $\frac{1}{2}$ inch from knot to knot." It was to be known as an eel draft-net.

The half-yearly meeting was held on the 6th May, when Mr. Devlin proposed that a license duty be fixed on an eel draft-net for Lough Neagh from the 1st July to the 31st October, in each year. The motion was carried, and also a motion that the license duty be fixed at £3, the maximum amount.

On the 17th May the clerk of the Board gave notice of the resolution according to its terms to the Department of Agriculture, and enclosed a copy of Mr. King's report. The Department declined to adopt the form of license, as not being in accordance with section 28; and on the 24th May the clerk wrote to the Department for information whether it was possible to amend the form of license for a draft-net for eels, so that it might be in accordance with the statute, and in what way should this be done. The Department, in reply, pointed out the two irregularities in the license, as it specified a part of the year instead of the year, and virtually fixed a close season.

On the 5th June the clerk, by direction, submitted for approval of the Department a form of license which seems legal in form, and the Department, in reply, asked whether the Conservators had considered section 11 of the 8 & 9 Vict. c. 105, which provided for the size of the mesh. The clerk replied that they had, and had by a majority come to the conclusion that, having regard to

the section, and section 66 of 5 & 6 Vict. c. 106, the exemption in favour of eel nets applied to the proposed, or any, net used solely for the capture of eels.

The Department, on the 12th July, wrote that there was no objection to the form of license for an eel net forwarded on the 5th, but that the mesh could not be smaller than $1\frac{3}{4}$ inches from knot to knot; and on the 2nd August they forwarded a form of license for eel draft-nets for the Coleraine District, which is general in its terms—"License for a draft-net for the capture of eels—license duty paid, £3." Under this correspondence, carried on between the Conservators from their meeting on the 6th May with the Department, the Conservators sent a form legal in its terms, and the Department approved of it, and sent a legal form which was in existence on and after the 2nd August.

On the 7th September, Johnston, the prosecutor, applied for a license for a draft-net for eels, which was then legally framed, and which they could have supplied, but which they refused to issue, probably under pressure of a caution received from the proprietor of an alleged private right of fishing in Lough Neagh, made by letter of the 9th August.

It appears to me this correspondence and action were all a carrying out of the resolution of the 6th May, as a result of which all irregularities were rejected, and a legal and regular form of license proposed and fixed.

If that is so, and I think it is, the Conservators were bound to issue the license. That is the opinion of the Lord Chief Justice, and I concur in his view, and think that the appeal must be allowed.

FITZ GIBBON, L.J.:—

I concur in opinion with the Lord Chancellor and the Lord Chief Justice. It may be, or it may not be, that the Conservators and the Department of Agriculture have made a mistake; but, between them, they have done everything necessary to entitle the relator, on tendering the license duty of £3, to demand, as of right, under 11 & 12 Vict. c. 92, s. 31, a license for "a draft-net for the taking of eels"—being one of the engines expressly mentioned in the Fishery Acts.

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We have heard a great deal of Lough Neagh in the arguments, but Lough Neagh is only part of the Coleraine District; and there may be other places within that district in which draft-nets can be used with advantage for taking eels, and ought to be duly licensed, even though they could not be used in Lough Neagh without either detriment to fisheries in general, or trespass upon private property.

Be that as it may, such considerations can not affect the right to demand a license for an engine mentioned in the Acts, when the form has been prepared and published, and the duty has been fixed as prescribed by the Fishery Acts.

The same section which gives the right to demand the license prevents its issue from conferring any right to use it or any other instrument for taking fish, by any means or in any place not therein authorised, and from affecting the rights of any other person. It is for the Conservators, or the Department of Agriculture, or for any persons aggrieved, with the aid of the law or of the Privy Council to protect private rights, and to stop illegal fishing, and to prevent detriment to fisheries in general, as well by legal proceedings, as also by obtaining any necessary by-laws regulating the user, size, character, mesh, or shape of the instruments to be used. But they can not refuse to issue a license for a net after the conditions precedent to the right to demand it have been fulfilled.

HOLMES, L. J.:—

The Act 11 & 12 Vict. c. 92, sect. 8, enacts that from and after the 1st January, 1848, all engines, nets, instruments, or devices used for the taking of salmon, trout, pollen, or fish of the salmon and trout kind, or for the taking of eels, shall before the same be used in any year be duly licensed and rated in the manner thereinafter prescribed, upon payment of the license duty thereinafter provided. By section 13 the Board of Conservators for each fishery district is empowered from time to time as they shall think fit, to fix and determine, subject to the approval of the Fishery Commissioners, the amount of license duty to be paid for every engine, net, instrument, weir, or device set forth in the schedule

to the Act, used for the taking of all kinds of fish already enumerated within such district, and for every engine, net, instrument, weir, or device for any such purpose which may be proposed to be used, and which is not set forth in the said schedule, provided that no license duty or rate to be fixed by the Conservators shall exceed the respective amount of duty specified therein. Section 21 deals with the mode in which the Conservators are to determine the license duty for engines, instruments, and nets not enumerated in the schedule, and prescribes the steps to be taken by a party proposing to use any such engine, instrument, or net. He is to give notice to some constabulary or coast-guard officer of the district, or to some inspector appointed under the Act, who is to forward to the Conservators a description thereof as to its relative capability of capture compared with the engines mentioned in the schedule, and to furnish the name by which it shall be designated, upon which the Conservators may authorise the use of the same upon payment of the license duty to be fixed by them. By sect. 22 severe penalties and forfeitures are imposed for the use without license of any of the engines, nets, and other devices subjected to license duty. By subsequent sections it is provided that the Commissioners shall prescribe the form of the licenses, that they shall be issued for the year specified therein, and that they are to be sold by persons appointed by the Conservators.

Section 31 provides that licenses must be sold to all persons demanding them without any question or objection arising either from the time when, the purpose for which, or the right in virtue of which, they may desire to use such licenses, or on any other grounds; but that the licenses shall not confer any right of fishing, or of using any instrument or device for taking fish by any means, or in any place, which the party using or having the license would not otherwise have possessed; nor alter or affect the rights of any other persons.

The distinction between the engines, nets, and instruments set forth in the schedule, and those not so set forth, is to be noted. In the case of the former no preliminary notice is required on the part of the applicant; the duty of the Conservators is confined to fixing the amount payable for the license not exceeding the specified sums; and as any person tendering the amount so fixed

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is entitled to receive in return the license asked for, the Conservators are, in my opinion, bound to perform the duty thus imposed on them, and if they refuse can be compelled to do so by writ of mandamus. If this were otherwise, the Conservators, by remaining quiescent, could defeat the intention of the Legislature, and make fishing impossible for persons entitled to fish. It is also to be noted that in the issue of licenses, the legality of the particular engine or net for which the license is required is not to be taken into consideration. Even when notice is given by a person of his intention to use an engine or net not enumerated in the schedule, and the prescribed report is sent to the Conservators, this document is confined to a description of the instrument, and to supplying the name by which it is to be designated. With this information before them, it is the duty of the Conservators to fix the license duty for the engine and device so described and named, leaving the question of its legality, if this question arises, to be dealt with in such manner as the law provides.

Having thus given an abstract of the statutory provisions relating to licenses for engines, nets, instruments, and devices used for the taking of salmon, trout, pollen, or fish of the salmon or trout kind, or for the taking of eels, I now proceed to state the circumstances that led to the application for the writ of mandamus which has been refused by the majority of the Divisional Court.

It appears that Richard Johnston, a fisherman exercising his calling on Lough Neagh, on the 7th September last, applied to Andrew King, the person appointed by the Conservators of the district to distribute licenses, to issue to him a license for a draft-net for the capture of eels in accordance with the Act 11 & 12 Vict. c. 92, whereupon having tendered £3 as the license duty he was informed by King that the Conservators had resolved not to issue any such license this season. I turn to the schedule of the statute, and I find set forth therein many kinds of nets, but except in the case of trammel-nets or draft-nets for pollen, for which the maximum duty is to be £1 10*s.*, there is no mention of the kind of fish for the capture of which such nets are intended. Engine No. 4 in the schedule is draft-nets or seines, which must include draft-nets for the taking of salmon, trout, eels, and fish of the salmon and trout kind, except pollen, with a maximum duty of

£3 for each net of this class. It would be I doubt not within the jurisdiction of the Conservators to fix a different duty for a draft-net used for taking salmon from that for a draft-net used for taking eels, or for taking trout, provided the maximum amount was not exceeded; and, therefore, when Johnston applied for a license for a draft-net for the capture of eels, he asked for a license for an engine or net set forth in the schedule—a license which he was entitled to receive without any preliminary notice or report. It is said that draft-nets for the capture of eels have not hitherto been used in the Coleraine fishery district; and the Conservators might, therefore, have thought it unnecessary to fix the duty payable thereon. If this were so, they would have been bound to fix the amount of duty, and to have the form of license settled as soon as possible after Johnston's demand; and in the meantime the Court would decline to issue a writ of mandamus.

But on the 2nd August last the Department of Agriculture and Technical Education, in which the duties of the former Fishery Commissioners are now vested, had, in consequence of correspondence with the Conservators, settled a form of license for eel draft-nets in the Coleraine district, which was duly published in the *Dublin Gazette* on the 11th August. It is admitted that in form this license complies with all legal requirements, and, unless some illegality or defect can be shown outside the document, the Conservators were not justified in directing their officer not to issue it. The case made on their behalf, as I understand it, is that they had never applied to the Department to settle a license of this kind; that they had not fixed the license duty therefor at £3, the sum stated therein; and that therefore there was no authority to prescribe such a license as appeared in the *Gazette*. The following grounds are relied on in support of this contention:—

In April last, a man named John Devlin, who is not shown to be connected in any way with Richard Johnston, required Mr. English, the clerk of the Board of Conservators, to place on the *agenda* paper, for the first meeting of the Board, notice of an application to fix the license duty for an eel draft-net for Lough Neagh, in accordance with the power vested in the Board by the Act 11 & 12 Vict. c. 92. Except that the license duty must be fixed for the whole fishery district, of which

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Lough Neagh is only a part, this application was perfectly regular; and a draft-net for eels being, as I have shown, one of the engines set forth in the schedule, the only duty of the Board was to fix the amount at such sum as they thought right, not exceeding £3. Mr. Devlin, being apparently under the impression that the net to which his application referred was not enumerated in the schedule, served notice, under the 21st section, on the inspector, Mr. King, who made the report prescribed thereby. It is argued that when the application came before the Board their attention was directed to a particular kind of net described in this report; but if this were so, they ought to have fixed the license duty not for a draft-net for eels, but for a net designated by the name, which the inspector is directed by sect. 21 to furnish with his report. The resolution, however, passed by them, as also the form of license forwarded to the Department for approval, was for a license for a draft-net for the capture of eels in Lough Neagh, to be used from the 1st July to the 30th of October, and that the license duty for each net should be £3 a year. By the terms of the statute, the license must be for the year in which it is issued, and must extend to the fishery district. Therefore the introduction of Lough Neagh and the period of four months had no efficacy; but I am unable to see how this can affect the amount of the license duty which the Conservators were bound to fix, and which under no circumstances could have exceeded £3, the sum actually fixed. Two or three letters passed between Mr. English and the Secretary of the Department, and at length, on the 5th June, the former wrote that he "was directed to submit for the approval of the Department a form of license for a draft-net for the capture of eels in this district." This was the form afterwards adopted and gazetted, and which I am of opinion Mr. Johnston was entitled to receive. There was no meeting of the Board of Conservators after the resolution was first passed; but I am satisfied that what was intended by that resolution was to fix the license duty for a draft-net for the capture of eels at £3, and that they left it to Mr. English to take the necessary steps to have such a license in legal form adopted and prescribed. Therefore, I agree with the Lord Chief Justice that Johnston ought to have been given a license, and that the writ of mandamus applied for by him ought

to go. I am glad that I am able to come to this conclusion, as to refuse the writ would probably lead to further litigation without benefit to anyone. In the end, the Board of Conservators would be obliged to fix the duty for such a license as Mr. Johnston required, and it is clear, from what they have already done, that such duty for all the year, and for the whole district, would not be less than the maximum authorised by the schedule.

I wish to add that the application to hear counsel on behalf of Mr. O'Neill was unsustainable. His *locus standi* was at first rested on rights of fishing claimed by him in Lough Neagh; but whatever these rights may be, they cannot be affected by any license issued pursuant to the statute of 1848. Still more untenable was Mr. FitzGerald's proposition that Mr. O'Neill ought to be heard as a license-holder himself, and, therefore, interested in the amount of duty. Applications for writs of mandamus or *certiorari* relating to poor rate and other assessments are not uncommon; but I have never heard it suggested that all persons liable to pay the rate were at liberty to intervene.

Solicitor for the prosecutor: *T. G. M'Keown.*
Solicitor for the Conservators: *J. A. Currie.*
Solicitors for the intervener: *French & French.*

R. D. M.

K. B. Div.
1905.
Nov. 16.
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Appeal.
1906.
Jan. 17.
Feb. 7.

MURRAY *v.* FITZGERALD (1).

Seduction—Service—Evidence of—Family living on farm of their deceased father—Seduced woman acting as indoor servant at time of seduction—Action brought by her brother as plaintiff.

Upon the death of a farmer, twenty-eight years prior to the commencement of the action, testate, but whose will was never proved, his widow and three children resided on the farm, which was managed by the widow until her death, which occurred eight years after that of her husband. Then her daughter, who was considerably older than the other two children (sons), and who was at that time the only adult member of the family, became manager, paid the rent, and got receipts in the name of her father's representatives. She also did the indoor servant's work, no servant being kept, and had charge of the domestic arrangements. Seven years later the elder of the two brothers attained twenty-one. From that time out he worked the farm, and was rated as the occupier. His sister continued to perform the duties of indoor servant, and to make things comfortable for her two brothers in the house.

In an action by the eldest brother for the seduction of his sister:—

Held, in the King's Bench Division, by Andrews and Boyd, JJ.; Gibson, J., *dissentiente*; and in the Court of Appeal, by Walker, C., and FitzGibbon, L.J.; Holmes, L.J., *dissentiente*, that there was evidence upon which the verdict of the jury in favour of the plaintiff could be sustained.

What is adequate evidence of service in such cases considered.

Per Gibson, J.: To sustain such an action the services must be rendered to someone entitled to them as master.

The statement of the law in Pollock on Torts, on actions of this nature, considered and approved by FitzGibbon, L.J.

Action by Michael Murray against William FitzGerald for damages for seduction by the defendant of Bridget Murray, the sister and servant of the plaintiff.

The following facts were proved:—Bridget Murray lived with her brothers Michael and Pat on a farm at Clashmore, in the county of Waterford. Their father had owned the farm. He died over twenty-eight years before the action, leaving a widow and the three children. He left a will, which had not been

(1) In the King's Bench Division, before Andrews, Gibson, and Boyd, JJ.

proved. After his death the mother managed the farm until her death about twenty years ago. At the time of the mother's death Bridget Murray, who was the only one adult, managed the farm and paid the rent, and got the receipts in the name of the representatives of Murray, and also did the work which an indoor servant would have done (no servant being kept), doing both outside and inside work. The salient points of her evidence are stated by Andrews, J., in his judgment, *infra*, p. 256. The money produced by the farm went to pay the bills and the rent. The rate receipts were in the name of Michael. When Michael grew up, he took up the management of the farm. Michael and Pat did the farm work, and Bridget did the housework; there was no inside servant kept. During the time that Bridget was ill, Michael paid for the nurse to attend to her. It was stated that there was an arrangement that if Bridget married, she was to have £100.

The jury found that at the times of the seduction and birth of the child, Bridget Murray was the servant of the plaintiff, and they found a verdict for £100.

The defendant moved to set aside the verdict and judgment for the plaintiff, and that judgment should be entered for the defendant, on the ground that there was no evidence to sustain the finding of the jury that the relation of master and servant existed between the plaintiff and Bridget Murray.

Carrigan, for the defendant.

W. G. Gibson, for the plaintiff.

ANDREWS, J.:—

We do not think that anything would be gained by reserving judgment.

There is a peculiarity in this case that to some extent distinguishes it from the cases cited, and I think the case before Judge Overend could not be regarded as an authority if the learned Judge intended to say that it was impossible in case of co-ownership that there could be the relationship of master and servant. Even if the decision went as far as that, though great regard would be due to it, it would not be binding on us or preclude us from forming our own opinion upon the question.

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Now, the facts of this case, so far as material, lie within a narrow compass, and the one point is as to whether there is sufficient evidence of service to enable the plaintiff to sustain the action.

No doubt there must be something which would justify the jury in coming to the conclusion that the relationship of master and servant existed between the parties, and, speaking for myself, I am not prepared to lay down the proposition that even in case of partnership the relationship of master and servant cannot be constituted between the partners so as to impose an obligation on one of the partners to perform certain duties, and give a right to the other to receive such as services. It may be legally possible that though there is a community of interests between them as to other matters, such a relationship might also exist.

What occurred up to the time the elder brother came of age is not, I think, material in the case, because it would be quite consistent with this that the girl Bridget, during the minority of the two brothers, should have acted as guardian, and taken charge of whatever was for their interests; but for a considerable number of years before the seduction the arrangement of the family seems to have been this, that she did what she states here:—"Since mother's death we three lived together—no inside servant—I have kept house and done the ordinary indoor-servant's work since my mother's death twenty years ago." I do not think that this question, "Were not you the head of the house?" and the answer, "Yes," put the case further. The head of the house in that way meant not that she was the owner of the house, but that she had charge of the domestic arrangements, and in that sense was the domestic mistress.

Then she was asked—"Who is the man of the house at the farm—which of your brothers?" and replied, "My brother Michael"—thus pointing to him as the person who was in general charge and control.

The course of dealing adopted after the brothers came of age seems to justify the jury in finding that substantially everything outside was done by the two brothers, and that the domestic duties which would otherwise have been done by a servant were done by the sister.

There was thus sufficient evidence to enable the jury to come to the conclusion that the brothers were entitled to these services from the sister, and that she was rendering the services to them not necessarily merely as a co-owner, but under an arrangement which gave them the right, so long as the arrangement was not determined, to have these services rendered by her to them as persons who were in the position of master, and though she might have determined that arrangement, that would not affect the case, because a servant might at any time determine the arrangement that existed before the time of the seduction and birth of a child.

I am not aware of any cases of co-ownership, if this be a case of co-ownership, having arisen before, but it is more in conformity with the course of judicial decision to hold that there was here sufficient to enable a jury to infer from the actual *de facto* performance of acts of service that there was subsisting the relationship of master and servant, and that, therefore, the verdict should stand.

BOYD, J.:—

I agree with my brother Andrews in the opinion he has formed in this case. I regret that the evidence is so meagre as regards several points in the case, as regards the tenure of the farm, and as regards the actual nature of the contract of service in the case, but there is a remarkable piece of evidence that I think we have a right, and the jury had a right, to consider, and which was not objected to when given at the trial.

Now, what we have to ascertain is, whether the two brothers and the sister were partners, or in what position the girl was there. There is no evidence of the father's will, or as to how the farm is held except the implication that it was held as a yearly tenancy. They all lived there after the death of the father, and there is this piece of evidence given by the girl herself and uncontradicted. After she had spoken about the condition she was in, she states:—"I pressed him to marry me; he said he was in dread he would not get his mother's place; I told him he could come on to my brothers' place and get a share of it, and I 'd get my brothers to do it. *I had a claim on the place* for £100."

Now, there is a piece of evidence uncontradicted, and which

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goes to some extent to elucidate one of the difficulties in the case. It is only by inference of law that we can come to the conclusion that the farm was held jointly at all; but here is a declaration by the girl, whether it was by contract or otherwise. "I had *a claim on the place* for £100."

The evidence is left in that way, and then come the facts that, as she says, since the mother's death she kept house, and did the ordinary indoor servant's work, and under what conditions did she do so? Was she a partner, or on the brothers' place by agreement with the brothers to serve them during the time the £100 was unpaid?

I think, on the whole, there is sufficient to support that fiction of service which is sufficient to maintain this sort of case, and I agree with my brother Andrews that the verdict should not be disturbed, and the motion refused with costs.

GIBSON, J.:—

This is a novel and, owing to the unsatisfactory state of our law, a hard case. There is no doubt that a substantial money loss has been inflicted, by the wrongful act of the defendant, upon the two brothers, as well as the sister, because, *de facto*, the brothers were enjoying the advantage of their sister's assistance, and when she was confined it was necessary to get other help, for which they had probably to pay.

I do not agree with the view that co-ownership necessarily is incompatible with such relation of master and servant as would support an action of seduction; but the difficulty I have in the case is as to what was the actual relationship existing between the parties. It is not enough that services were rendered, they must have been rendered to a person in the position of master. Suppose that the owner of a house has visitors in the house: these visitors have services rendered by the servants, but they do not occupy the position of a master or mistress for the purpose of maintaining an action of seduction. In this particular case there is no master beside the two brothers or the plaintiff; so that if they are not in the position of master, no one else is. Sometimes difficulty has arisen where there might be two masters at the same time, each of whom separately might claim to be entitled to bring an action of

seduction and to damages. In this case what was the relationship the girl occupied to her two brothers? Is there evidence to justify the inference that she was a servant, rendering services to them or the plaintiff as master, or was the real relationship that of joint partners with division of labour?

There is no evidence as to the actual ownership of the farm. The only inference to be drawn from the facts is that the two brothers and the sister were co-owners. If they were co-owners, is what was done by the sister to be regarded as a division of duties between persons working *pro bono communi*, or as services rendered to the two brothers as masters?

Mr. Justice Andrews has arrived at a conclusion on the merits in accordance with mine; but I fear the evidence is at least as consistent with the work having been done for the brothers as partners; and if that were so, the action could not be maintained. It is a difficult case, as is apparent from what my brother Andrews has said. The action is so far founded on fiction that sometimes it is impossible to reconcile the view of the Court with commonsense or reality. On the whole, I think that the onus of proof which the plaintiff must establish is not supported. The case is remarkable in this, that there is no other master in existence, and that there has been a real pecuniary loss imposed on the brothers by the act of the defendant.

If the view of my brother Andrews is correct, that wherever there is interference with services rendered to the prejudice of the person enjoying such services that is sufficient to give a cause of action, the plaintiff must succeed; but I think the law requires something further: the services must be rendered to someone entitled to them as master. In cases where there is a real contract, as in the ordinary case of master and servant, there is no difficulty; it is only where service is attributed to some moral duty that a question arises.

Here the parties were co-owners; and it being legitimate to refer the services rendered to that relationship, my view is in favour of the defendant. There would be no advantage in reserving judgment in a case of this small character, where the expense of reserving judgment would be undesirable, and I state my present inclination of opinion.

R. ST. J. C.

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The defendant appealed (1).

Carrigan, for the appellant:—

There is no evidence of service in this case, and judgment ought to be entered for the defendant. Bridget Murray and her brothers were all co-owners of the farm. Where there are three partners, and one of them is incapacitated, the other two cannot sue for the loss of the third partner. If the three children of this farmer had all been daughters, and one of them had been seduced, the other sisters could not have sued for the loss of service: *Clements* v. *Boyd* (2). If the relation of master and servant does not exist, there is no foundation for the fiction on which the action of seduction is founded. Bridget Murray was as much entitled to a share in the farm as the two brothers, and the wages of the nurse were paid out of the common fund. A parent is in a different position from a brother, because a parent can command the services of a son or daughter, and if they do not give them, the parent can put them out; but here the brother could not eject his sister, if she refused to work. But even a parent cannot maintain an action for seduction for a daughter who is living with the parent, but doing no work: *Thompson* v. *Ross* (3). Occasional assistance in the discharge of home duties does not create the relation of master and servant: *Hedges* v. *Tagg* (4); *Whitbourne* v. *Williams* (5); *Barbour* v. *Barron* (6). There cannot be two services and two rights of action at the same period of time: *Kearney* v. *M'Murray* (7).

W. G. Gibson, for the respondent:—

The jury have found that Bridget Murray was in the service of the plaintiff, and the Court will not disturb the verdict unless the Court should hold that no reasonable men could come to such a conclusion. There was sufficient evidence to show that Bridget Murray filled the position of servant to the plaintiff. The action, no doubt, rests on a fiction, but it is a fiction based on a

(1) In the Court of Appeal, before WALKER, C., and FITZGIBBON and HOLMES, L. JJ.
(2) 28 I. L. T. 44.
(3) 5 H. & N. 16.
(4) L. R. 7 Ex. 283.
(5) [1901] 2 K. B. 722.
(6) 28 I. L. T. R. 97.
(7) *Ibid.* 148.

fictitious relation, and not on reality. Services rendered to a parent by a daughter, in the employment of a third person, during leisure hours, are sufficient to support the action: *O'Reilly* v. *Glavey* (1); Pollock on Torts (7th ed.), p. 226.

WALKER, C.:—

Feb. 7.

In this action of seduction the only question we have to determine is whether there was any evidence reasonably fit to be submitted to the jury on the issue of service.

The jury found, in answer to a question submitted to them, that, at the time of the seduction and birth of the child, Bridget Murray was the servant of the plaintiff. The defendant gave no evidence. Was he then entitled to a direction on the issue raised?

In applying the evidence, we must remember that what we have to consider is whether there was any evidence sufficient to support the existence of the fiction on which the action rests. It would be illogical if it were necessary to establish a reality in service, and loss of service, greater than necessary to serve the fiction. The existence of the service is a question of fact, and depends on evidence; but for its application I adopt the rule as stated by the Lord Chief Baron in *O'Reilly* v. *Glavey* (1):—

> "An actual contract of service, express or implied, is not necessary to maintain the action; but, on the contrary, services voluntarily rendered are sufficient. What does that establish? It establishes that although the plaintiff may not be in a position to sue the daughter for non-render of the service—that is, although the plaintiff is not entitled in point of law to the service, still the action can be maintained."

With that legal rule in view, let us consider the facts. A father, the owner of a farm of some sixty acres, died many years ago, leaving a widow and three children, Bridget, Michael, and Pat. He left a will not proved, and for the purposes of the case we must assume that the widow had her share, and the three children each one-third of the rest. On the dates given in the somewhat meagre evidence it would appear that the mother died in 1882, and Michael did not attain age till 1889. The mother during her life, as was natural, assumed the management of the

(1) 32 L. R. Ir. 316, 324.

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farm, and paid the rent. On her death, Bridget, who was considerably older than Michael, took over the management, and paid the rent, and this rent is still paid through her hands. The receipts are given to the representatives of Murray *per* Bridget Murray. She was asked leading questions in cross-examination, to which she gave affirmative answers, such as:—"Were not you the head of the house?" "Yes." "The money produced by the farm went to pay the bills and rent?" "Yes." It is manifest this was pointed to the period of the minority of Michael, because she afterwards said when Michael grew up he took the management of the farm, and that he was the man of the house. He went to fairs, and bought and sold their cattle and produce; and it appears that Michael paid the rates, and is rated occupier. He hired the labourers; whoever happened to be in the house paid such money as was wanted. There was no indoor servant kept, and she did ordinary servant's work. If Bridget was not there, or did not do that work, a servant should have been got. Her own position, as she understood it, was that when she married, she was to be paid a sum of £100. She did not suppose, she says, that she would get the farm. When she became ill, in consequence of the seduction, the plaintiff hired the nurse and paid her.

I have said that whether she was servant or not is a question of fact. The basis of the action of seduction is service, and loss of service, but in most cases the existence of the service is a fiction. It may, no doubt, be real; but in case of father and daughter, mother and daughter, brother and sister, there is never found a contract to serve; what you find is services performed, and generally domestic services, and from this the basis of the action is supplied.

There is in this case no difficulty arising from the character of the acts of service done, for they were here continuous; nor from the time or times at which they were rendered, such as the broken period of a day. The fiction is that the legal right of the plaintiff to the service has been infringed, and that is sufficient against the defendant as a wrong-doer. Why should we defeat the action, which rests on a fiction, by setting up the necessity for a real contract of service legally enforceable? Sense of duty to her brothers, and to the household, induced her to do the indoor work, there being

no servant. The answer put forward is that the children were tenants in common of the farm and house, and therefore, though there were services rendered, the doing of them must be attributed to the common ownership. There was surely nothing to prevent an express contract between the plaintiff and his sister that she should do the indoor work, and perform all the duties of a servant, and if so, and if domestic services were in fact rendered, was there not a state of things proved from which a jury might infer that she, being a woman and sister, should discharge the duty—one of imperfect obligation, no doubt—but valuable? She might have refused, and then they should get a servant, and incur the expense of feeding and keeping her. If there was such a servant paid out of the common fund, then there might be no service to sustain the legal fiction, and it would be a case of simple co-ownership. If there is a family, of which a brother is the head, and the sister in fact renders services, it would seem to me the jury may consider the eldest brother to be the real head of the house. We must remember, all through, that we are considering not whether the jury might not have found differently, but whether there is any evidence to support what they did. Payment for the service is not necessary to create the fictitious relation.

Gibson, J., agrees that co-ownership is not incompatible with such a relation of master and servant as would support the action. The co-ownership seems to me material upon the question of fact, whether the legal fiction existed in the case; but seeing that—(1) there was no master but the brother, if he could be such; (2) that services were in fact rendered; (3) that pecuniary loss was sustained by the plaintiff; and (4) that there was no separate establishment, the case is reduced to the same position as if, during the mother's life, the mother having assumed the management of the farm, this girl had done inside work, and in that case I apprehend that the mother could clearly have maintained the action, though she had really only the mother's share under the statute.

The case is different from those where the seduced girl was in the service in fact, all through, of some person other than the plaintiff, and that person had, at the moment of the seduction, the legal right to her whole service, such as *Thompson* v. *Ross* (1)

(1) 5 H. & N. 16.

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and *Hedges* v. *Tagg* (1). This rebutted the existence of the fiction.

Such services as were proved here were not legally incompatible with the relation of common ownership, which existed in the farm. They were in fact rendered, and therefore it was not a case for a direction in favour of the defendant, as his counsel contends. I think the appeal should be dismissed.

FITZ GIBBON, L.J.:—

I find it impossible to question the verdict in this case without disturbing the settled law as to the action for seduction. The judgments of Andrews, J., and Boyd, J., appear to me to put the plaintiff's right on its proper foundation. The judgment of Gibson, J., is rather a doubting than a dissenting judgment. He truly says that it is a hard case; but I cannot agree with him that "the action is so far founded on fiction that sometimes it is impossible to reconcile the view of the Court with common sense or reality."

I am unable to disturb the verdict, because I cannot hold that a reasonable jury could not find, on the evidence, that the relation of master and servant—as legally understood for the purposes of such an action—existed between the plaintiff and his sister, and that a loss of her *service* was caused to the plaintiff by her seduction.

The "fiction," which Gibson, J., regarded as irreconcileable with common sense or reality, can be defined. It is the fiction of "*actual service*"; but the word "service" is ambiguous, and Sir Frederick Pollock says, of "the relation of master and servant," that in modern law it is "created by contract, but for some purposes" (including that of supporting the action of seduction) it "is still regarded as belonging to the permanent organism of the family, and having the nature of *status*." The "difficulty in fixing the boundary where the sphere of domestic relation ends and that of pure contract begins, is only a difficulty of degree."

We have here, in my opinion, ample evidence to establish "the

(1) L. R. 7 Ex. 283.

domestic relation" of master and servant, and that relation is quite enough to sustain the action. "Service" is the test word. In the Imperial Dictionary I find the following definitions of it:—"Labor performed in the interest of others"; "Any work done for the benefit of another"; "The act of helping another or of promoting his interests in any way." In these senses it means little more than *assistance*. It also includes "the work of a person in any way *held to obedience* or duty," and "the official duty or work required of one." The so-called fiction only imports *obligation* into the relation which supports the action of seduction, and as to that Sir Frederick Pollock says—(p. 223) Pollock on Torts:—

> "The test of the plaintiff's right has come to be, not whether he has been injured as the head of the family, but whether he can make out a *constructive* loss of service."

It is clearly settled that seduction can be maintained where there is no *servitude*—no actual *obligation* to serve. The domestic relationship does not necessarily depend on blood relationship—it is not confined to parent and child. A lady has maintained the action for the seduction of even an unpaid companion. It is sufficient if help of appreciable value is rendered by one member of a household to another member of the same household, who is "head of the house." The defendant's counsel asked Bridget Murray—"Weren't you the head of the house?" and she answered, "Yes." But Johnson, J., asked her—"Who is the man of the house at the farm?" and she answered, "My brother Michael is." I think the fair meaning of these answers is, that she was the housekeeper, and he was the head of the family. If reasonable men could accept that evidence, we cannot disturb the verdict.

What are the facts? We have to deal with the family of a farmer, who at his death left a widow and daughter and two sons surviving him. The widow afterwards died. There is some confusion as to the ages of the children at the dates of the death of the father and mother; but we cannot set aside a verdict because the dates are vague. When the father died, the youngest son must have been very young. The daughter was the eldest of the three. The mother survived the father for some time, and she died about twenty years ago. At that time the daughter only was

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adult. While the widow lived, she certainly was the head of the house. The widow managed the farm and household until her death. She certainly could have maintained the action if her daughter had been seduced during her life. While she managed the place, her position in respect of ownership, as the widow of the deceased tenant, seems to me to have been exactly the same, both in law and in fact, towards her daughter, as that which was taken up by the elder son, as soon as he became old enough to undertake the management. Until then the rent was paid by the daughter, but in the name of her father's representatives; but from the time when the plaintiff took up the management, he paid the rates, he employed all the farm servants, and the rent was paid out of the produce of the farm, still in the name of the father's representatives. The ordinary house-work of the family—all the work of a female domestic servant—was done by the sister. The younger brother may be left out of consideration, for he was not old enough to take any part in the management, and if his sister rendered any "service" to him, she did so for her elder brother too. Not only did she perform all the necessary domestic service of the household, but when she was incapacitated, the elder brother had to employ and pay some one else to do her work, and if she had not been there, he would have had to pay a domestic servant. He paid the nurse who attended his sister when she was ill. Under these circumstances—as the law stands—I think the jury was not only justified, but was right, in finding that, at the times of the seduction and birth of the child, Bridget Murray was the servant of the plaintiff.

My view of the law is put by Sir Frederick Pollock so clearly that I take the liberty of adopting the following passages from his book (1), and incorporating his language with my judgment :—

> "In this kind of action it is not necessary to prove the existence of a binding contract of service between the plaintiff and the person seduced. The presence . . . of seduction . . . is not a necessary part of the cause of action, but only a circumstance of aggravation. Whether that element be present or absent, proof of a *de facto* relation of service is enough . . . when once the relation of master and servant at the time

(1) Pollock on Torts (7th ed.), p. 226.

of the acts complained of is established. . . . Some evidence of such a relation there must be, but very little will serve. . . . The fact of a child living with a parent, or any other person *in loco parentis*, as a member of the family of which that person is the head, is deemed enough to support the inference that the relation of master and servant, *determinable at the will of either party*, exists between them.

"Partial attendance in the parents' house is enough to constitute service, as where a daughter employed elsewhere in the daytime is, without consulting her employer, *free to assist, and does assist*, in the household when she comes home in the evening. Some loss of service, or possibility of service, must be shown as consequent on the seduction, since that is, in theory, the ground of action; but when that condition is once satisfied, the damages that may be given are by no means limited to an amount commensurate with the actual loss of service proved or inferred. The awarding of exemplary damages is indeed rather encouraged than otherwise. It is immaterial whether the plaintiff be a parent or kinsman, or a stranger in blood, who has adopted the person seduced.

"On the same principle or fiction of law a parent can sue in his own name for any injury done to a child living under his care and control, provided the child is old enough to be capable of rendering service; otherwise not, for the gist of the action depends upon the capacity of the child to perform acts of service."

Sir Frederick Pollock also seems to me to deal satisfactorily with the very difficulties which weighed most with Gibson, J. :—

"The capricious working of the action of seduction in modern practice has often been the subject of censure. Thus, Serjeant Manning wrote more than fifty years ago :—'The *quasi* fiction of *servitium amisit* affords protection to the rich man, whose daughter occasionally makes his tea, but leaves without redress the poor man, whose child is sent unprotected to earn her bread amongst strangers.' All devices for obtaining what is virtually a new remedy, by straining old forms and ideas beyond their original intention, are liable to this kind of inconvenience. It has been truly said that the enforcement of a substantially just claim 'ought not to depend upon a mere fiction over which the Courts possess no control.' We have already pointed out the bolder course which might have been taken without doing violence to any legal principle. Now it is too late to go back upon the cases, and legislation would also be difficult and troublesome, not so much from the nature of the subject in itself as from the variety of irrelevant matters that would probably be imported into any discussion of it at large."

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The judgment of Gibson, J., contains some statements which —with all respect I say it—ought, in my opinion, to have removed his doubts, and changed his decision. He says—

> "There is no doubt that a substantial money loss has been inflicted by the wrongful act of the defendant upon the two brothers, as well as the sister, because *de facto* the brothers were enjoying the advantage of their sister's assistance, and when she was confined it was necessary to get other help, for which they had probably to pay."

The non-joinder of the younger brother cannot affect the elder brother's right to sue; and if this statement is well founded, it establishes the plaintiff's right of action.

He further says—

> "There is no evidence as to the actual ownership of the farm. The only inference to be drawn from the facts is that the two brothers and the sister were co-owners. If they were co-owners, is what was done by the sister to be regarded as a division of duties between persons working *pro bono communi*, or as services rendered to the two brothers as masters? I fear the evidence is at least as consistent with the work having been done for the brothers as partners, and if that were so the action could not be maintained."

These difficulties are met by the woman's evidence that she did not regard herself as a co-owner, that she regarded her elder brother as "the man of the house," and that, if she went away, she was to get only a sum of money, £100, but was not entitled to a partner's share.

Finally, Gibson, J., says—

> "The case is remarkable in this, that there is no other master in existence, and that there has been a real pecuniary loss imposed on the brothers by the act of the defendant."

This being so, I am clearly of opinion that the case is brought well within the authorities, and that there is ample evidence of the existence of the relationship necessary to entitle the plaintiff to maintain the action.

HOLMES, L.J. :—

The question in this case is whether there was evidence to go to the jury that the plaintiff's sister, Bridget, was his servant, as service is understood in this class of action.

Although there are some obvious mistakes in dates, it is not difficult to ascertain the family history of the Murrays. The plaintiff, his sister, and a younger brother, are living on a farm, of which their father was tenant. He died in the lifetime of his wife, who, I gather from one of Bridget's answers, managed the farm while she lived. On her death, Bridget took her mother's place. She is ten or thirteen years older than the plaintiff, who was then a minor. Accordingly she assumed the entire management of the farm, and, to quote her own words, "directed her brothers." She paid the rent—the receipts having been given in the name of the representatives of Murray, *per* Bridget Murray, and I have no doubt had general control of the money of the family. The plaintiff, from the time he grew up, has managed the farm, buying and selling the produce, and hiring labour as it was required. I would gather, however, that the sister was still custodian of the common purse. She has continued to pay the rent; and the plaintiff said in his evidence, that whoever happened to be in the house when money was required would pay it—"I often myself paid for labour if Bridget was not there."

What is the inference to be drawn from these facts? Is it not that the brothers and sister are occupying the farm as the next-of-kin of their father and mother? There is no evidence of their being there in any other right. Bridget said her father left a will; but it was never proved, and even if there was such a document, we have no knowledge of its contents. Boyd, J., seems to have attached some importance to Bridget's statement that when she was pressing the defendant to marry her, she told him that he could come to her brothers' place and get a share of it—that she had a claim on it for £100. But this must be taken in connexion with the plaintiff's evidence, that the proposal to give her £100 was made by, or to, the priest after the occurrence. It is evident that what was contemplated was to buy out her interest in the farm for this sum, and thus enable her to bring a fortune to the defendant, if he married her. I am of opinion that the only inference of which

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the admitted facts are capable is that the three Murrays were entitled to the place in equal shares; and that they were working it as partners, each of them taking such share in the management as was suited to his or her sex and age.

Having arrived at this conclusion, I proceed to consider whether a verdict that Bridget was the plaintiff's servant is consistent with it. The action of seduction is founded on the wrong done to a person, who is entitled to, or enjoys, the benefit of the services of the person seduced. It cannot be maintained without some proof of service or liability to service, although such proof is often very slight, and the service purely conventional. No difficulty arises where there is a contract to serve, express or implied. The master in such a case can always sue; and an implied contract may be inferred from very trifling circumstances. For example, a lady taken as a companion by another lady, without salary, and from motives of friendship, might be regarded in an action of this kind as the latter's servant, if she makes herself useful in the house. It would be a reasonable inference that she gives this assistance in return for, and in consideration of, the comforts of a home.

I think that at least one of the Judges of the Divisional Court held that in the present case the jury were at liberty to infer from the facts a contract of service. I am of opinion that there is no evidence from which such an inference can be drawn. What was the consideration given by the plaintiff for such a contract? No doubt Bridget did the indoor work, thus saving the wages of a servant, just as her brothers, by their labour on the farm, reduced the need of hired help; but the sister was no more serving them than they were serving her. Their position might be compared to the case of three ladies carrying on a trading establishment as partners, each superintending a different department of the business. If one becomes temporarily incapacitated for work, the loss is felt by all; but it would be, I think, absurd to suggest that, if such incapacity arose from pregnancy, the others would have a cause of action against the seducer. It would only intensify the absurdity, if the two other partners were in turn seduced, to assert that an action lay at the suit of the partner who had already yielded to temptation.

I have thus far considered the case on the basis of implied contract, which was, I think, the ground taken by the majority of the Divisional Court. I do not, however, forget that there is a kind of service wholly unconnected with contract that will support an action of this kind. It has always been held that where a daughter, living with a parent, is seduced, the parent is entitled to sue the wrong-doer, upon showing that the girl has rendered the slightest service in the family. I have no doubt that this rule of law arose from the idea that she is under a moral obligation to carry out the wishes of, and to make herself useful to, a parent, under whose protection and guidance she is living. This principle has been extended in two directions. It has been held to apply in a few exceptional cases where, at the time of the seduction, the daughter is not actually living, at least permanently living, with the parent. It has also been held to apply to cases where the nominal services are rendered, not to a parent but to a person *in loco parentis*. It is unnecessary for me to examine the authorities on those branches of the rule; for in the first the parent is always the plaintiff; and as to the second, no one could suggest that Michael Murray was *in loco parentis* to a sister, ten or thirteen years older than himself, who managed the money of the family, who gave card-parties and other entertainments, and who was, as she said in her evidence, the head of the house.

For these reasons I concur in the opinion of Gibson, J., that the defendant was entitled to a direction in his favour at the close of the plaintiff's case.

Solicitor for the plaintiff: *John F. Williams.*
Solicitor for the defendant: *Edward P. Williams.*

R. D. M.

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Feb. 12, 26. *Revenue—Estate duty—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *sect.* 5, *sub-sect.* 3—*Interest in possession—Conveyancing form.*

Where, under a settlement, H. took a vested legal estate as tenant in common in fee, with a limitation over on his dying under twenty-one, subject to a proviso that during his minority trustees were to enter into receipt of the rents, providing thereout for his maintenance, &c., and to accumulate the surplus upon trust, if he should attain his age, for him; but if he should die under age, for the persons who should ultimately become indefeasibly entitled; and H. dying under age, the defendants became indefeasibly entitled as tenants in common in fee of all the lands in the settlement, including H.'s share:—

Held, that estate duty was not payable as on a property passing on H.'s death; that H.'s interest had not become a beneficial interest in possession in the lands at his death; and that, accordingly, section 5, sub-section 3, of the Finance Act, 1894, was applicable (2).

Held, also, that the real nature of the transaction must be considered, and not only the conveyancing form.

Semble: That estate duty might be payable on the actual sums received by H. for maintenance, upon the analogy of the provision with regard to legacy duty, under 36 Geo. 3, c. 52, s. 11, and 54 Geo. 3, c. 92, s. 12 (Ir.).

INFORMATION by the Attorney-General seeking to have it declared that estate duty had become payable under the Finance Act, 1894, in respect of certain fee-simple estates which had passed to the defendants by reason of the death of their brother, Hubert Power, on the 5th August, 1898.

The estate of the deceased was derived through two settlements dated the 30th of June, 1873, executed in contemplation of the marriage of his parents. The material limitations were similar in each settlement.

By these settlements the property was limited to trustees and

(1) Before PALLES, C.B., and GIBSON, J.

(2) "In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death."

their heirs from the death of the survivor of the father and mother (which occurred on the 12th January, 1892), in the events which happened "to the use of the children of the intended marriage and their respective heirs and assigns, for ever, as tenants in common," with a limitation over "if, and so often as any of the said children shall die under the age of twenty-one years, without leaving issue at his or her death, then, as well as to his or her original share, as also to the share or shares which shall have accrued to him or her under the limitations herein contained, to the use of the other of the said children and their respective heirs and assigns, for ever, in equal shares as tenants in common."

Each deed also contained a proviso—"If any one who, but for this proviso, for the time being entitled to the possession or receipt of the rents of the premises or of any undivided share of them, shall, being a male, be under the age of twenty-one years, or, being a female, be under that age and not under coverture, the trustees shall enter into the possession or receipt of the rents, and shall, during the minority of such person, continue in such possession and receipt, and manage the same, and shall apply an annual sum or sums which they shall think proper, according to the age of such minor, in or towards his or her maintenance, education, advancement or benefit, and shall invest the residue, and accumulate the annual income thereof, and be possessed of the rents and accumulations, and the income thereof, if the person during whose minority the rents shall have been accumulated shall attain the age of twenty-one, upon trust for such person, but if such person, being a male, shall die under twenty-one, then upon trust for the person or persons who shall ultimately become indefeasibly entitled to the premises or the undivided share."

The deceased Hubert Power, one of the children of the marriage, died on the 5th August, 1898, under age, and without leaving issue living at his death.

The two defendants, George Power and John Power, were the only two children of the marriage who survived Hubert, and who took indefeasible estates under the settlements. George had attained the age of twenty-one before Hubert's death, and John attained age on the 15th April, 1900.

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There was no evidence as to what sums (if any) were paid by the trustees for maintenance before Hubert's death.

The Attorney-General (*The Rt. Hon. R. R. Cherry, K.C.*) and *The Solicitor-General* (*Redmond Barry, K.C.*) (with them *Coll*), for the Attorney-General :—

Duty is payable on the capital value of Hubert's entire third share. The children took legal estates under the settlements. Hubert was a tenant for life, under the Settled Land Act, and entitled to possession means possession as distinguished from reversion : *In re Morgan* (1) ; *In re Jones* (2) ; *In re Clitheroe's Estate* (3).

Ronan, K.C., and *O'Connor, K.C.* (with them *A. C. Meredith*), for the defendants :—

Estate duty is not payable at all. The estates are settled property within section 5 (3) of the Finance Act, 1894, and subsequent limitations under the settlement continue to subsist. Hubert's interest never became an interest in possession. The real nature of the transaction must be looked to apart from conveyancing form. A beneficial interest only is subject to duty. If the settlements had been drawn in the ordinary form, and the children had not taken any vested estates before attaining age, the rights of the children, apart from the question of legal estates, would have been the same, as far as putting the money into their pockets. The maintenance clause does not give any interest in property within the meaning of the section : *In re Bowlby* (4) ; *In re Atkinson* (5) ; *Re Horne* (6) ; *Attorney-General* v. *Worrall* (7) ; *Re Cochrane's Estate* (8).

Cur. adv. vult.

(1) 24 Ch. D. 114.
(2) 26 Ch. D. 736.
(3) 31 Ch. D. 135.
(4) [1904] 2 Ch. 685.
(5) 31 Ch. D. 571.
(6) 39 Ch. D. 84.
(7) [1895] 1 Q. B. at p. 104.
(8) [1905] 2 I. R. 626.

PALLES, C.B. :—

The object of this information is to obtain the opinion of the Court as to whether estate duty became payable in respect of one-third of certain fee-simple estates which, by reason of the death of Hubert Power, on the 5th August, 1898, passed to the defendants.

The claim to duty is resisted upon the ground that the estates are "settled property," within the meaning of section 5, sub-sect. 3, of the Finance Act, 1894; that the interest of Hubert Power determined by his death before it became an interest in possession; and that subsequent limitations under the settlement continued to subsist at his death. If these conditions existed, the property would, under the above sub-section, not "be deemed to pass on his death," and consequently estate duty would not be payable.

It is admitted that the two first conditions have been satisfied; the estates are "settled property," and subsequent limitations under the settlement continued to subsist at the death. The only question for decision, therefore, is: Was the estate of the deceased in the lands an *interest in possession* at his death?

The estate of the deceased in these lands was derived through two settlements, executed in contemplation of the marriage of his parents, one of which settled the part of the property in question, which was derived from the father, and the other the residue of the property, which was brought into settlement by the mother. Each of these settlements is dated the 30th of June, 1873, and we are told that the material limitations are similar in each, so that it is sufficient to refer to one only of them.

By the settlement of the father's property, which is the one before me, that property was limited to trustees and their heirs, from the death of the survivor of the father and mother (which occurred on the 12th January, 1892), in the events which have happened, to the use of the children of the intended marriage and their respective heirs and assigns, for ever, as tenants in common, with a limitation over, which is expressed in these words—"If and so often as any of the said children shall die under the age of twenty-one years without leaving issue at his or her death, then as well as to his or her original share, as also to the share or shares which shall have accrued to him or her under the limitations herein contained, to the use of the other of the said children and

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their respective heirs and assigns, for ever, in equal shares, as tenants in common." The deed then contains a proviso, upon the effect of which our decision must rest. It is, that if anyone who, but for that proviso, for the time being entitled to the possession or receipt of the rents of the premises or of any undivided share of them, should being a male be under the age of twenty-one years, or being a female be under that age, and not under coverture, the trustees should enter into the possession or receipt of the rents, and should during the minority of such person continue in such possession and receipt, and manage the same, and should apply an annual sum or sums which they should think proper, according to the age of such minor, in or towards his or her maintenance, education, advancement or benefit, and should invest the residue and accumulate the annual income thereof, and be possessed of the rents and accumulations and the income thereof, if the person during whose minority the rents should have been accumulated should attain the age of twenty-one, upon trust for such person, but—and here comes the provision upon which I think the decision must turn—"if such person being a male should die under twenty-one, then upon trust for the person or persons who should ultimately become indefeasibly entitled to the premises or the undivided share."

Hubert Power, one of the children of the marriage, died on the 5th of August, 1898, under age and without leaving issue living at his death. Only two children of the marriage, the present defendants, survived Hubert. One of them, the defendant George Power, had previously attained the age of twenty-one. The other defendant, John Emanuel Power, was a minor at the death of Hubert, but attained his age on the 15th of April, 1900. On the death of Hubert, the defendant George, and on the 15th April, 1900, when he attained age, the other defendant entered into possession. They were the only children who took indefeasible estates, and are now tenants in common in fee in possession of all the lands, including Hubert's one-third.

There seems to be no doubt that the eldest child on his birth took a vested legal estate in remainder in fee in the entire lands, subject to executory limitations over as to the aliquot parts thereof on the birth of each succeeding child, so that each child on his birth took a vested estate in fee in an undivided part of the

lands, subject to limitations over, and that but for the proviso which I have stated, Hubert's estate would have been upon his death an estate in fee in possession in one-third, subject to an executory limitation over in the event of his dying under age and without leaving issue at his death, and, in that event, his third would, upon his death, have been liable to finance duty. The question for decision depends upon the effect of the proviso. It has been admitted by the Crown, and, as I think, rightly, that although this proviso may not vest a legal estate in the trustees, it was sufficient in equity to effectually capture the rents and profits of Hubert's third share, from his father's death in 1892, to his own death in 1898, and to dedicate them to the trusts thereby declared; and we have to determine whether the existence of these trusts is sufficient to prevent Hubert's estate being one in possession; and as the only interest taxable under the Finance Act is a beneficial one, it is immaterial that the legal estate in Hubert's third remained in him till his death; the liability to duty is the same as if the legal estate had been in the trustees for such a period as was necessary for the performance of the trusts.

Thus the question is, Did Hubert, under the trusts, take a beneficial interest in possession in the lands, which ceased on his death, within the meaning of sect. 2 (*b*), and sect. 5, sub-sect. 3? If he did, then estate duty is payable, "to the extent to which a benefit" accrued or arose by the cesser of such interest; and the value of that benefit, *i.e.* the taxable amount, is fixed by sect. 7, sub-sect. 7, as the principal value of the entire third, if his interest extended to the whole income; and if the interest extended to less than the whole income of the third, the same sub-section fixes the value of the benefit as the principal value of an addition to the "property equal to the income to which the interest extended," which, I suppose, is an inaccurate expression for "property the income of which is equal to the income to which the interest extended."

The Act contains ample provision for the valuation of ascertained interests in property; but we have not been referred to any enactment, nor am I aware of any, which enables the extent of a particular interest to be ascertained for the purposes of the Act when the real interest is not ascertainable from the

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instruments of title and the acts of the parties, or when the existence or extent of that interest depends upon acts which were not in fact done. I may remark that this species of uncertain interest, and the necessity for special legislation which it gives rise to, were not unknown to the Legislature, for, by the 36 Geo. 3, c. 52, s. 11 (England), and the corresponding Irish statute, 54 Geo. 3, c. 92, s. 12, special provision is made for payment of legacy duty on benefits given by wills in such terms that the amount or value thereof could be ascertained only from time to time by the actual application for that purpose of the fund allotted. This section is applicable to ascertaining the duty on a testamentary trust or power for maintenance; but the Finance Act does not appear to have any correlative provision for ascertaining the amount of benefit under such a trust, when that amount becomes material for the purpose of measuring the value of the estate which is to be deemed to pass by reason of its cesser; and even were the provisions of the Act of Geo. 3 applicable, there is neither proof nor allegation that any sum was, in fact, applied for the benefit of Hubert Power, and under that statute the value of the interest is fixed at the amount actually applied. It was, I suppose, for this reason, but whatever may be the reason, the fact is, that it is admitted by the counsel for the Crown that unless the interest of Hubert Power must, for the purposes of the Finance Act, be taken to extend to the whole income of his third, the present information is not maintainable, and they have told us that it was framed as it has been, for the purpose of obtaining the decision of the Court, as to the liability to duty calculated upon the capital value of the entire share, and that they do not seek a decree for any less amount.

Had, then, Hubert Power an interest, within the meaning of the Act, extending to the entire income of his third? In one sense, he may be said to have had such an interest. One who has a charge of £100 a year, upon an estate of £2000 a year, may be said to have an interest in the entire estate, and in its accruing income; but it is not in that sense that the words "the income extended to the whole income of the property," are used in sect. 7, sub-sect. 7 (*a*). In the case I put, the owner of the charge would have an interest, to the extent of £100 a year, and of that only,

out of the income of the estate, because that was the sum which he was entitled to be paid out of that income. Now, the cardinal fact here, and that on which I base my judgment, is that Hubert was not entitled to be paid the *whole income* of the third. The residue, after payment of such sums as should be applied for his maintenance, &c., and prior charges, was to be accumulated, and to be held on trusts under which, not Hubert, but the present defendants, became entitled. Was Hubert's interest an interest "in possession," which I agree with the Attorney-General means possession properly so called, as distinct from remainder or reversion? The cases which have been cited do not assist us much. All of those cited for the Crown were decisions as to the construction of the Settled Estates Act. "Estate in possession" in that Act, a remedial Act which enlarged the powers of sale of those interested in land, even were there not in the Act the extensive definition that it contained, would not necessarily have had the same meaning as in a taxing statute such as the Finance Act.

The infant in *In re Morgan* (1) was held to have an estate in possession, because the *whole* income during his minority was given in trust for his maintenance, education, and benefit; and it was held that that trust could not be limited by the direction that his mother should not be liable to account for the same.

In *In re Jones* (2) Colonel Grey was held, under the express words of the Settled Land Act, 1882, to have the powers of a tenant for life, because he would have been entitled to the surplus income of the land, had there been any surplus income to receive after satisfying prior charges.

Clitheroe's Estate (3) was decided upon the ground, distinctly put by both Lord Hannen and Fry, L.J., that whatever might be the proper force of the words "in possession," ordinarily used in reference to estates, yet, under the Act in question, the fact of there being an antecedent interest which supported a trust for accumulation, did not prevent the subsequent estate from being treated as in possession, and Lord Hannen stated that the estate was not one in possession as that expression is ordinarily used.

In re Atkinson (4) was decided upon the distinction between

(1) 24 Ch. D. 114.
(2) 26 Ch. D. 736.
(3) 31 Ch. D. 135, 139, 141.
(4) *Ibid.* 577.

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the particular trust there and the trust mentioned in one of the provisions of the Act.

The principle of *In re Bowlby* (1) is more in point, although that case was antithetical to the present. The judgments there very markedly show the distinction in the ownership of the surplus, after payment of maintenance, of the interest, during minority, on a legacy to a child, between the cases, on the one hand of the legacy being vested, and, on the other, of the legacy being contingent, with an express direction for the child's maintenance. In the one case, the surplus is the property of the child; in the other, it forms an accretion to the capital, and does not necessarily go to the child or his representatives. The present is a correlative case. Here, although the estate is vested, subject to being divested, all the rents and profits until Hubert's death were captured by the trusts, and the surplus income after payment of maintenance, instead of being the property of the child in any event, formed an accretion to the estate, and went with it to the present defendants. Thus, the reasoning in reference to the distinction between maintenance and interest there is applicable to the distinction here between maintenance and rents and profits. Had Hubert here been entitled to the entire surplus of the rents and profits of his share, I should have held his estate was one in possession; but being, as I hold him to be, entitled to part only of that surplus, and that fluctuating, uncertain, and incapable of being defined or ascertained irrespective of its application, I must hold that his estate is not in possession, and that such sums as he might receive for maintenance were payable to him, not by reason of his vested estate, which must be taken to be subject to the estate or interest of the trustees, but as maintenance *eo nomine*, out of the express trust for its payment to him out of the interim income of an estate, the present income of which was not his, but the trustees'.

As conveyancing forms must, to a certain extent, be disregarded in questions upon this Act, so that a person cannot be permitted to evade estate duty by clothing a transaction, which was in its reality and essence one which would subject the property to estate

(1) [1904] 2 Ch. 685.

duty in a particular event, in such a conveyancing form that it would escape it, so I think that it can be well contended that a transaction cannot be made liable to duty merely by its conveyancing form, when the beneficial estate actually taken is substantially the same as would have been taken under a conveyance in the ordinary form, and when, if taken in the latter form, it would not be within the Act. For this reason I think well worthy of consideration Mr. Ronan's argument that the beneficial estates which the children took under the settlement are identical with those they would have had, had the estates been limited to the use of the trustees and their heirs in trust, in the specified event, for such children of the marriage as being sons should attain twenty-one, or being daughters should attain that age or marry, or who, whether sons or daughters, should die under twenty-one, leaving issue living at his or her death, with such a provision for maintenance as is here, or without it, in which event a substantially similar provision would have been implied by the Conveyancing Act. In such a case, would estate duty be payable on the death of a child who died without having attained a vested interest in the estate? I understood the Attorney-General to admit—and I think he was right—that it would not. What is the difference in substance between that case and the present? I confess that I cannot see any. Further, I hold that this is not only the result of the actual words of the Act, but, were it material, could be shown to be fully in accord with its spirit.

In cases such as the present, the intention, as it exists in fact, the spirit of the settlement as recognized by Courts of Equity, is to provide not for all the children who may actually come into *esse*, but for such only of them as in event shall require provision. The birth and death of a child who does not live to require provision may be said, just as might the birth and death of a child who died immediately after birth, to be accidents, in relation to the title and disposition of the property. Such accidents do not really affect that disposition, and ought not, according to the scheme of the Act, to subject the property to increased taxation. The increased benefit in the property, which the children who ultimately take would not have acquired but for the death, is acquired, not by reason of "the cesser of" an interest in the child who died, but by an accident

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by reason of which the class who, amongst them, were to take, in any event, the entire of a property (which remained unaffected in extent or interest by the death) is less numerous than it otherwise would have been, but which still contains the entire of those who required to be provided for and all those who were intended to be benefited. Upon the death of such a child there is not any property which can be said to pass, or to be deemed to pass, within the words of sections 1 and 2 of the Finance Act, or, in my opinion, within the true intent and spirit of the earlier Act.

Upon the whole, I am of opinion that estate duty is not payable, and that this information should be dismissed with costs.

GIBSON, J., concurred.

Solicitor for the informant: *The Solicitor of Inland Revenue.*
Solicitors for the defendants: *Kenny & Stephenson.*

R. G. L. L.

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THE KING (FOXALL) *v.* THE COUNTY COUNCIL OF CORK (1).

Light railway—Baronial guarantee—Management of undertaking becoming vested in committee of management—Guaranteed dividends—To whom payable by County Council—Tramways and Public Companies (Ireland) Act, 1883 (46 & 47 Vict. c. 3), s. 10.

A public Company, incorporated for the purposes (amongst others) of promoting a light railway and obtaining a baronial guarantee, obtained, under the Tramways and Public Companies (Ireland) Act, 1883, a presentment from the Grand Jury, charging certain baronies with the payment of the dividends and the sums required for completing, working, and maintaining the undertaking, which presentment was duly confirmed by Order in Council, as provided by the Act. The guaranteeing baronies having been obliged to pay for upwards of two years moneys for maintaining and working the undertaking, an Order in Council was made, appointing a committee of management of the

(1) Before LORD O'BRIEN, L.C.J., and ANDREWS and GIBSON, JJ.

Grand Jury (subsequently represented by a committee of management of the County Council), for the purpose of managing the undertaking:—

Held, that the dividends payable by the guaranteeing baronies did not become payable to the committee of management, but continued to be payable to the directors of the Company.

MANDAMUS.

The Ballinascarthy and Timoleague Junction Light Railway Co., Limited (hereinafter called the Ballinascarthy Co.), was a public Company, incorporated for the purpose, amongst other things, of applying for, and obtaining, the presentment, and Order in Council, hereinafter mentioned.

At the Spring Assizes, 1884, the Grand Jury of the county of Cork made a presentment approving of the construction, maintenance, and working, by the Ballinascarthy Co. of a light railway between Ballinascarthy and Timoleague, in the county of Cork; and declaring the baronies in the presentment mentioned should be chargeable with the payment of the half-yearly dividends, at the rate of 5 per cent. per annum, in perpetuity, upon the paid up capital, as defined by the Tramways and Public Companies (Ireland) Act, 1883. By an Order in Council of the 1st February, 1888, the Lord Lieutenant authorized the construction, maintenance, and working, by the Ballinascarthy Co., of the said light railway, and confirmed the presentment, so far as it related to the charge to be defrayed by the guaranteeing baronies for the payment of the dividends, and the liability to provide for the completing, working, and maintaining of the undertaking. Clause 44 of the Order provided that if at any time the guaranteeing baronies should have been called upon to pay, and have continued to pay, during a period of two years, any money for maintaining and working the said undertaking, then the undertaking and all the property of the Ballinascarthy Co. connected with it should become the property of the Grand Jury, subject to any liabilities affecting such undertaking or property; and the Lord Lieutenant might thereupon order that the Grand Jury should appoint a committee of management for the purposes of the undertaking (1).

(1) The Order will be found p. 134, and the presentment p. 141, of the *Dublin Gazette* for 1888.

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The Timoleague and Courtmacsherry Extension Light Railway Co. (hereinafter called the Courtmacsherry Co.) was also a public company, incorporated under the Companies Acts, 1862 to 1883, for the purpose, amongst other things, of obtaining a presentment, and Order in Council, for the construction, maintenance, and working, by such company of a light railway between Timoleague and Courtmacsherry, in the county of Cork. Such presentment and Order were subsequently obtained, and contained similar provisions, *mutatis mutandis*, to those in the presentment and Order made in respect of the Ballinascarthy Company (1).

Both light railways were constructed in accordance with the Orders in Council, and were duly opened for public traffic prior to the year 1891, and from that year up to and including the year 1895, were worked together as one continuous undertaking by the Ballinascarthy Co.; but in each half year during this period the expenses of management and working and proper maintenance of the undertaking exceeded the gross receipts, as appeared by certificates of the arbitrators appointed under the Tramways and Public Companies (Ireland) Act, 1883.

By the Ballinascarthy and Timoleague Junction Light Railway and the Timoleague and Courtmacsherry Extension Light Railway Joint Committee of Management Order, 1896, after reciting that the Grand Jury had, by a memorial, represented that during the years 1891, 1892, 1893, 1894, and 1895, the guaranteeing baronies had been called upon to pay, and had continued to pay, sums of money for maintaining and working the said undertakings respectively, and that such sums had been duly levied and paid, it was ordered by the Lords Justices and General Governors of Ireland that the Grand Jury should appoint a committee of management for the purpose of managing the said undertakings—that was to say, the undertaking of the Ballinascarthy Co., and the undertaking of the Courtmacsherry Co. The Order contained a number of clauses with respect to the constitution and powers of the committee of management. Clause 10 provided for

(1) The Order will be found p. 329, and the presentment p. 336, of the *Dublin Gazette* for 1889.

the payment of £1 1s. to each member of the committee for every meeting he attended.

Clause 11 was as follows :—"Subject to the provisions of the hereinbefore recited Orders in Council respectively and the Acts therein incorporated and the Tramways (Ireland) Acts, and to any Order which the Lord Lieutenant may from time to time make, the management and control of the said undertaking and property shall be vested in the committee, and the committee may in addition to the powers of this Order expressly conferred on the committee exercise all such powers and do all such acts and things as under the said Orders in Council respectively and the said Tramways (Ireland) Acts might have been exercised and done by the Ballinascarthy Co. and the Courtmacsherry Co. respectively with reference to their respective undertakings and property, as if such undertakings and property respectively had continued to be the property of the said respective companies, except such powers acts and things as are by statute directed or required to be exercised by either Company in general meeting."

The 35th clause provided that in the Order the word "undertaking" should mean "the Light Railways, respectively, and all works connected therewith, respectively, and all the lands, buildings, plant, machinery, articles, and other property of whatsoever kind, which have been transferred from the Company to, and become the property of, the Grand Jury, under the hereinbefore-recited Orders in Council, and the Tramways and Public Companies (Ireland) Act, 1883, or which may hereafter become the property of the Grand Jury as proprietors of the Light Railways and property aforesaid."

None of the clauses in the Joint Order dealt with the payment of dividends.

The undertakings were thenceforward managed by a committee of management, appointed under the last-mentioned Order, by the Grand Jury, down to the coming into operation of the Local Government (Ireland) Act, 1898, and after that by the County Council of the county of Cork; and in each half year the amount certified by the arbitrators appointed under the Tramways and Public Companies (Ireland) Act, 1883, as the amount which the

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guaranteeing baronies were liable to contribute towards the guaranteed dividends of both Companies was, down to the year 1903, paid to the Companies, who distributed the same among the shareholders.

In December, 1903, the directors of the Companies, considering that as the undertakings were vested in the County Council all their powers and duties were determined, sent in their resignations, and, in consequence, the County Council declined to pay the amount of the guaranteed dividends for the half years ending the 30th June, 1903, and the 31st December, 1903, on the ground that there was no one in a position to give them a valid discharge for same.

Subsequently, at an extraordinary general meeting of the Companies, held in June, 1904, directors of the Companies were appointed, and application was made to the County Council on their behalf for payment to them of the dividends. The County Council having, in the meantime, received an intimation from the authorities at Dublin Castle that the Lord Lieutenant had been advised that the committee of management was the body to distribute the guaranteed dividends, refused to pay the amount to the directors. They also refused to pay the amount to the committee of management.

The prosecutrix, a shareholder in both Companies, obtained, on the 26th January, 1905, a conditional order for a writ of mandamus, directed to the Treasurers of the County Council, commanding them to pay to the committee of management the amount of the guaranteed dividends for the two half years, ending 30th June, 1903, and 31st December, 1903 (1). A conditional order for a mandamus had also been obtained in a matter in which the two companies were named as prosecutors, directing payment to the Companies of the amounts in question.

The present application was to make absolute the first-mentioned conditional order, viz., that directing payment to the committee of management.

(1) By order of the Local Government Board the time for payment had been extended to 31st January, 1905.

Herbert Wilson, *K. C.* (with him the *Solicitor-General*, *Campbell*, *K.C.*, and *Macrory*), for the prosecutrix:—

Under section 10, sub-sect. 2, of the Tramways and Public Companies (Ireland) Act, 1883, and clause 44 of the Orders in Council, confirming the presentments, in the events mentioned in the sub-section, the undertaking "and all the property connected with it" become the property of the Grand Jury. "The undertaking" as defined by clause 35 of the Order of 1896, includes the railways and works connected therewith, lands, buildings, plant, &c. Some effect must be given to the word "property" as distinct from "undertaking." We submit it is wide enough to cover the dividends. This is further borne out by clause 11 of the Order of 1896, which vests in the committee of management all the powers of the Companies "except such powers acts and things as are by statute directed or required to be exercised by either Company in general meeting." As there is no statute requiring the power of paying dividends to be exercised in general meeting, this exception strongly supports the construction that such power has been transferred to the committee of management. Why should directors be brought into existence merely for the purpose of distributing dividends? There is no fund available for the payment of directors, while each member of the committee of management is entitled to £1 1*s.* for every meeting he attends.

Ronan, *K.C.*, and *Conner*, *K. C.* (with them *D. M'Carthy Mahony*), for the County Council of Cork:—

When the Legislature wishes to do what it is suggested has been done here, it knows how to do it, as is shown by the Transfer of Railway (Ireland) Act, 1890, 54 Viet. c. 2, which provides (sect. 4) for the dissolution of the promoting company, and for the exercise of all its powers by the railway company, to which the undertaking has been transferred. The provisions in the Tramways and Public Companies (Ireland) Act, 1883, are quite different. That Act and the Orders made under it operate merely to transfer the undertaking, and the property of the Company connected with it. The company itself is not dissolved, nor are any of its powers interfered with except those connected with the control and management of the undertaking. The company may have, in

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addition to powers enabling them to construct the proposed tramway, powers for other purposes, as the Companies here have, and such powers are not transferred. Suppose the Corporation of Cork obtained a presentment for the construction of a tramway, as they might do, since by sect. 25 any body corporate may be promoters, and the tramway failed to pay dividends, could it be contended that all the powers of the Corporation of Cork passed to the committee of management?

The "undertaking" means the tramway and works authorized by the Order: Tramways (Ireland) Act, 1860, 23 & 24 Vict. c. 152, sect. 20, incorporated with the Act of 1883 by section 25 of that Act. The "property of the company connected with" the undertaking would include the rolling-stock, tickets, furniture of waiting-rooms, &c.

In the case of registered companies, sect. 32 of the Companies Act, 1862, requires the register of members to be kept at the registered office of the company, and there is nothing in the Act of 1883 dispensing with this requirement. Suppose a company is formed for the purpose of obtaining presentments for two distinct tramways, one of which continues to pay dividends, and the other fails to do so, what is to happen if the contention on the other side is right? Are there to be two offices and two registers of shareholders?

The Order of 1896 was made in pursuance of the Orders confirming the presentment, and these Orders derive their effect from sect. 10 (2) of the Act of 1883. The Order of 1896 can give no powers to the committee of management, except with respect to the subject-matter transferred by sect. 10 (2), viz., the undertaking and property connected with it. The exception in clause 11 of the Order of 1896 was probably inserted *ex abundanti cautelâ*; but, at all events, if it purports to vest in the committee of management anything more than is authorized to be vested under the Act, it is *ultra vires* and void.

Macrory, in reply:—

The undertaking is to be considered as "a fruit-bearing tree," *per* Lord Cairns, *Gardner* v. *London, Chatham, and Dover Railway*

Company (1), and the produce of it, that is, the dividends, should be deemed to vest in the committee of management.

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April 20.

Cur. adv. vult.

LORD O'BRIEN, L.C.J. :—

The bad fortune which has attended two light railways in the county of Cork, the Ballinascarthy and Timoleague Junction Light Railway Co., Limited (which I shall, for shortness, call the Ballinascarthy Co.), and the Timoleague and Courtmacsherry Extension Light Railway Co., Limited (which I shall call the Courtmacsherry Co.), has developed for our determination a question of law, viz., whether, in the events that have happened, the managing committee of the Cork County Council, or the directors of the Companies, are entitled to receive certain moneys which are applicable for the payment of the guaranteed dividends. That is the net question.

The Light Railways I have mentioned were formed in the usual way. The two Companies were constituted under the Companies Acts; guarantees were obtained from the Grand Jury, and confirmation orders from the Lord Lieutenant in council. Mr. Spiller, the secretary of both Companies, states, in the affidavit made by him, that "Both the said light railways were constructed in accordance with the said Orders in Council, and were duly opened for public traffic prior to the year 1891, and from that year up to, and including, the year 1895 were worked together as one continuous undertaking by the Ballinascarthy Co.; but in each half year during the said period the expenses of the management and working and proper maintenance of the undertaking exceeded the gross receipts thereof." Subsequently the undertakings of these Companies became vested in a committee of management appointed by the Grand Jury, and afterwards by the County Council of the county of Cork.

The question is, as I have said, are the sums which were appropriated for the payment of dividends to be paid by the Treasurer of the County Council to the committee of management, or to the directors of the Companies. During the course of the

(1) L. R. 2 Ch. 201, at p. 217.

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argument I ventured to observe that the solution of this question depended on a single section, sect. 10 of the Tramways and Public Companies (Ireland) Act, 1883, and to that opinion I still adhere. Before reading the 10th section it is to be remembered that the guarantee for the payment of dividends on the paid-up capital, and the contribution for the payment of the expenses of the working and maintenance of the line, are totally distinct subject-matters. This is made plain by sect. 1 of the Act, and is perhaps shown even more clearly by sect. 4, which provides as follows:—"During the continuance of the guarantee the net receipts from the tramway, after deducting from the gross receipts the expenses of management and working and proper maintenance of the tramway, shall be applied to the payment of a dividend at the guaranteed rate on so much of the share capital of the company applicable to such tramway as is for the time being paid-up capital within the meaning of this Act; and in the event of a total failure or partial insufficiency in any half year of such net receipts to pay such dividend, then the sums required to pay such dividend or to make up any deficiency therein shall be charged upon and levied off the barony or baronies chargeable under the guarantee, and the sum so levied shall be applied for that purpose, and to no other purpose whatever." So that it is plain that there is not one fund out of which the different sums for different purposes may be drawn, but there is here a distinct fund, ear-marked for a distinct purpose, namely, the payment of certain classes of specified shareholders.

The 10th section, upon which, as I have said, I think the case rests, provides as follows:—"(1) Every Order in Council which confirms a presentment of a Grand Jury for a baronial guarantee under this Act shall contain all such provisions as may be necessary for securing that the tramway shall be completed, and shall be maintained in good order and condition, and shall be efficiently worked by the company or their assigns; and that if default is made in such completing, or if at any time the receipts from the undertaking are insufficient to defray the expenses of management, and of efficiently maintaining and working the undertaking, then such sums as may be necessary for those purposes shall be contributed from time to time by the guaranteeing baronies, in the same proportions, and shall be assessed

and levied in the same manner, as their contributions on account of their guarantee; and such Order shall provide for the manner in which such sums shall be applied for those purposes under the control of the Grand Jury. (2) Such Order shall also provide that if the guaranteeing baronies have been called upon to pay and have paid any money for completing the tramway, or if they have been called upon to pay, and have, during a period of not less than two years to be fixed by the Order, continued to pay any money for maintaining or working the undertaking, then the undertaking, and all the property of the company connected with it, shall become the property of the Grand Jury, subject to any liabilities affecting such undertaking or property." It is quite plain that what becomes the property of the Grand Jury is the undertaking—that is, the fabric and equipment; the words are *undertaking, and all the property of the company connected with it*; and, I think it is plain, independently of the definition in the earlier Act, that in the section I am reading "undertaking" means the railway line, the fabric and equipment. "The undertaking, and all the property of the company connected with it," means the railway, houses, furniture, rolling-stock, &c. The clause then goes on: "And the undertaking shall be maintained and worked by the Grand Jury at the cost of the guaranteeing baronies"—*maintained and worked*, two important words which have certainly no reference to guaranteed dividends—"and the Order shall also provide for the mode in which the undertaking shall be so maintained and worked." That is to say, the Order shall provide, in the first instance, for the vesting in the Grand Jury of the undertaking, and shall also provide for the mode in which the undertaking shall be worked. It is, therefore, perfectly plain that the effect of sect. 10 is, as it is stated in the marginal note to the section to be, that provision shall be made by Order in Council for the working of the line. The Order to be made under sect. 10 is an Order for the maintenance and working of the line; and any Order which purported, as regards the working of the line, to go beyond this would, in my opinion, be *ultra vires*.

There is nothing in this section, or any other section, to do away with the Company. The Company remains as an existing entity, with all its powers and liabilities, save as regards the fabric

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of the line and the matters which are expressly taken away; and there is no provision in this Act taking away the power to receive dividends.

A good deal of stress was laid by Mr. Wilson in his clear argument upon the 11th clause of the Order in Council of the 7th July, 1896, which is as follows:—"Subject to the provisions of the hereinbefore recited Orders in Council respectively and the Acts therein incorporated and the Tramways (Ireland) Acts, and to any Order which the Lord Lieutenant may from time to time make, the management and control of the said undertaking and property shall be vested in the committee, and the committee may in addition to the powers of this Order expressly conferred on the committee exercise all such powers and do all such acts and things as under the said Orders in Council respectively and the said Tramways (Ireland) Acts might have been exercised and done by the Ballinascarthy Company and Courtmacsherry Company respectively with reference to their respective undertakings and property as if such undertakings and property respectively had continued to be the property of the said respective Companies." That plainly deals with the fabric and its equipment, and does not in any way deprive the original directors of their rights to receive these dividends. Then there comes this exception at the end of the clause—"except such powers acts and things as are by statute directed or required to be exercised by either Company in general meeting." It is not very clear what the Council or the draftsman meant by that exception. I think that it was inserted *ex abundanti cautelâ*. At all events, if it is in any way inconsistent with the provisions of sect. 10 of the Act of 1883, it can have no operation.

It is said that there were some communications between the authorities in Dublin Castle and the County Council to the effect that the managing committee were to get these dividends, and to keep a register. Certainly it appears to be unreasonable to contemplate putting upon the managing committee the responsibility of keeping a register from time to time, with all the various duties incident thereto. I do not think that there is any sanction for that in the Act of Parliament. I think that the Act of Parliament is reasonably plain, and that these dividends should be paid to the directors.

As the question involved is entirely new and of general importance, and not perhaps free from difficulty, we think that there should be no costs.

ANDREWS, J. :—

This was a motion on behalf of the prosecutrix (who is a shareholder in the Light Railway Companies which I shall refer to) to make absolute a conditional order of the 6th of January last, for the issue of a writ of mandamus, commanding the treasurer of the Cork County Council to pay to the committee of management of two Light Railway Companies, which for brevity I shall call the Ballinascarthy Company and the Courtmacsherry Company, the sum of £1750, being the admitted amount of the guaranteed dividends on the paid-up capital of these Companies for the half years ending the 30th of June and the 31st of December, 1903. The motion was opposed by the Cork County Council, on whose behalf it was contended that the directors of these Companies were the proper persons to whom this £1750 should be paid.

The Companies referred to were incorporated under the Companies Acts, 1862 to 1883, for the purposes (amongst other things) of obtaining, for the promotion of the proposed light railways, baronial guarantees, and Orders in Council confirming them. The Ballinascarthy Company, in 1888, and the Courtmacsherry Company, in 1889, obtained Orders in Council giving them power to construct their lines, and confirming the Grand Jury presentments, which they had previously obtained, for baronial guarantees; and clause 44 of each of these Orders provided that if at any time (as happened) the baronies should have been called upon to pay, and should have continued to pay for two years, any money for maintaining or working the undertaking, then the undertaking, and all the property of the Company connected with it, should become the property of the Grand Jury (now represented by the County Council), subject to any liabilities affecting such undertaking, and the Lord Lieutenant might thereupon order that the Grand Jury should appoint a committee of management for the purposes of the undertaking, which appointment was afterwards made. The 35th clause of the Joint Order in Council of 1896 defined "the undertaking"

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to mean "the light railways and all works connected therewith, and all the lands, buildings, plant, machinery, articles, and other property, of whatsoever kind, which have been transferred from the Company to, and become the property of, the Grand Jury under the hereinbefore recited Orders in Council and the Tramways and Public Companies (Ireland) Act, 1883, or which might hereafter become the property of the Grand Jury as the proprietors of the light railways and property aforesaid."

The Joint Order in Council of 1896 constituted the committee of management; and by its 11th clause provided that, subject as therein mentioned, *the management and control* of the said undertakings and property should be vested in the committee, which might, in addition to the powers thereby expressly conferred upon it (none of which dealt with the payment of dividends), exercise all such powers and do all such acts and things as under the therein recited Orders in Council and the Tramways (Ireland) Acts might have been exercised and done by the Companies *with reference to their respective undertakings and property*, as if these had continued to be the property of the Companies, except such powers, acts, and things as were by statute directed or required to be executed by either Company in general meeting.

The 44th clause of each of the Orders of 1888 and 1889, and the 11th clause of the Joint Order of 1896, have for their authority the 10th section of the Tramways (Ireland) Act, 1883 (46 & 47 Vict. c. 43), which regulates the provision to be made by Order in Council *for the working of the line*, and after enacting that every Order in Council confirming a presentment for a baronial guarantee should contain all provisions necessary for securing the *completion, maintenance, and efficient working of the tramway* by the Company, it proceeds to enact that such Order should also provide that (in the events which have happened in this case) the undertaking, and all the property of the Company connected with it, should become the property of the Grand Jury, subject to any liabilities affecting it, *and the undertaking should be maintained and worked by the Grand Jury* at the cost of the guaranteeing baronies, *and the Order should also provide for the mode in which the undertaking should be so maintained and worked.*

I think it clear that when, under these provisions, the under-

takings and property of the Companies became vested in the committee of management, the duty and power of the committee were a duty and power of management only, and that such management was limited to the maintenance and working of the undertakings. This management was taken from the Companies, but they were not dissolved. They continued in existence, with all the duties and powers they originally possessed, save the duty and power of management so taken from them. The undertakings and property of the Companies connected with their undertakings, and vested in the committee of management for the purposes of the management thereof, did not, in my opinion, include the dividends to result from such management, or from the baronial guarantees. These dividends, in my opinion, were manifestly not vested in either the Grand Jury or the committee of management, and did not become their property. They remained the property of the shareholders in the Companies, and the persons who were to receive them on behalf of the shareholders were, in my opinion, the same persons who would have received them on behalf of the shareholders, if the management of the undertakings had remained with the Companies—namely, their directors, who continue to exist, and have still to discharge the various duties originally imposed upon them (other than the duties of maintaining and working of the undertakings), such as the distribution of the dividends amongst the shareholders, the keeping of the registers of shareholders and transfers, the exercise of borrowing powers, the appointment of directors in certain cases, the keeping of minutes, and all the other business of the Companies outside the maintenance and working of the undertakings. It is also to be observed that the constitutions of these Companies extend to a variety of matters in addition to their actual undertakings as now existing, with which the committee of management have nothing to do, but in which, if the Companies embarked in them, they would have to act through their directors.

The words in the end of clause 11 of the Joint Order in Council of 1896, by which there are excepted from the powers conferred on the committee of management (*which are powers with reference to the undertakings and property of the Companies*)—"such powers, acts, and things as are by statute directed or required to be exer-

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oised, by either Company in general meeting"—appear to me to have been added for more abundant caution, lest there might be any such powers, acts, and things with reference to the undertakings and property of the Companies; but whatever the construction or explanation of these words may be, they cannot confer on the committee powers not authorised by the 10th section of the Act of 1883, under which the committee's powers cannot, in my opinion, exceed powers of maintenance and working of the undertakings.

The result, in my opinion, is, that the persons who are entitled to receive from the County Council the £1750 guaranteed dividends, referred to in the conditional order, are the directors of these Companies, and the present motion ought, therefore, to be refused, and the conditional order discharged, but without costs.

GIBSON, J.:—

The acquisition by the Grand Jury of the undertaking, and all the property of the Company connected therewith, has not the effect of dissolving the Company. The Company, which, according to the definition, includes a public company, body corporate, or other public body, exists before the guarantee is given, and such Company is not necessarily restricted to one tramway or railway undertaking; nor must all its shares be of the same character. Some may be guaranteed; some not. The guaranteed shareholders are entitled to the guaranteed dividends made up by the baronies, which are specifically appropriated for their benefit: *Ex parte Finlayson* (1); *Ex parte Robson* (2). The transfer of the undertaking to the Grand Jury cannot affect the guaranteed shareholders' rights. Nor, where the Company (as here) is a limited Company, can such transfer remove the statutory duty imposed on the Company of holding annual general meetings, or the duty of the directors to convene extraordinary meetings when required. The Company, though its area of action is reduced by the transfer of the undertaking, continues to exist as a Company; it remains bound to hold general meetings, and to keep and produce the share register. If, before transfer, the directors were

(1) 5 L. R. Ir. 584. (2) 17 L. R. Ir. at p. 154.

entitled to receive dividends as agents for the shareholders, I cannot see anything to substitute for them the Grand Jury or committee of management. The committee are not made directors, and they do not represent the guaranteed shareholders in any way. Their powers are limited to what is transferred, that is, the undertaking and the property connected with it. They exercise for that limited purpose the functions of directors, but they do not displace the directors of the Company for other purposes; the Company, as a subsisting Company, remains subject to statutory and other obligations, and enjoys the same rights as before, so far as is consistent with the transfer of the undertaking and property connected therewith. The committee cannot be required to collect the barony contributions for the guaranteed shareholders, and undertake responsibility for the payment to the right persons. The Company must receive the money, and account for it to the shareholders on the register (1).

Solicitor for the prosecutrix: *Charles Mac Mahon.*
Solicitor for the County Council of Cork: *A. H. Exham.*

J. G. T.

(1) By consent, the conditional order obtained in the matter of *The King (Ballinascarthy and Timoleague Light Railway Co., Limited, and Timoleague and Courtmacsherry Extension Light Railway Co., Limited)* v. *The County Council of Cork and the Treasurer of said County Council,* directing payment of the amount of the dividends in question to the prosecutors in that matter, was made absolute.

K. B. Div. 1905. Oct. 27. Nov. 4, 10. 1906. Jan. 15.

THE KING (AT THE PROSECUTION OF ANDREW KING) *v.* THE CHAIRMAN AND JUSTICES OF ANTRIM (1).

Fisheries—Deleterious matter—Dilution in river—Point at which deleterious character of matter placed in river is to be ascertained—5 & 6 Vict. c. 106, s. 80—Quarter Sessions—Acquittal, subject to case stated—Speaking order —Certiorari—*Common Law—Power to remit to Quarter Sessions—"Person" as applied to corporations.*

F. & H., Ltd., a firm of millowners at H., were prosecuted for having caused deleterious or poisonous liquid to flow from their works into the river M., in breach of 5 & 6 Vict. c. 106, section 80. The case was dismissed by the magistrates before whom it was originally heard, and, on appeal to Quarter Sessions, it was heard by the Chairman alone, who came to the conclusion on the facts that the matter, although highly deleterious to fish when discharged into the river, became, at the instant of its getting into the river, so largely diluted as to cease to be deleterious. Holding that the point at which it was to be determined whether the discharge was deleterious or not, under the section, was immediately after it entered the waters of the river, he dismissed the summons, but subject to a case stated for the opinion of the King's Bench Division.

The order of the Chairman of Quarter Sessions, incorporating the case stated, was brought up by writ of *certiorari*, and the sufficiency of the reasons set out in the case stated as justification for the order of acquittal was discussed:—

Held, by Lord O'Brien, L.C.J., Palles, C.B., and Gibson, J. (Madden and Wright, JJ., *diss.*), that the time at which the deleterious character of the matter was to be ascertained was the moment it entered the river; that the effect of the action of the river upon it was immaterial, and that, accordingly, the grounds set out in the case stated as a justification for the acquittal were bad in law.

Held, per Curiam, that when a Court of Quarter Sessions acquits a defendant, and makes the acquittal subject to a case stated, wherein the reasons on which the Quarter Sessions acted are set forth, and such acquittal is brought up into the King's Bench Division by writ of *certiorari*, there is jurisdiction, under the Common Law, in the King's Bench Division to inquire into the sufficiency of the reasons so set forth, and if such reasons be found insufficient, the King's Bench Division will quash the order of Quarter Sessions.

(1) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and GIBSON, MADDEN, and WRIGHT, JJ.

But the jurisdiction of the King's Bench Division in Ireland is confined to affirming or quashing the order of Quarter Sessions. There is no jurisdiction analogous to that which prevails in England under the Supreme Court of Judicature Act, 1894, section 2, to remit the order with the opinion and direction of the Court for rehearing and determination of the Court of Quarter Sessions.

Held, also, that a corporation is a "person" within the meaning of 5 & 6 Vict. c. 106, s. 80.

FRAZER & Haughton, Limited, millowners, were summoned to appear at the Petty Sessions of Ballymena, county Antrim, at the instance of Andrew King, fisheries inspector, Toombridge, to answer a complaint under 5 & 6 Vict. c. 106, s. 80 (1), that they did cause a certain deleterious or poisonous liquid to flow from their works at Hillmount into the River Maine. The case having been heard before the Justices on October 7th, 1904, an order was made dismissing the charge on the merits. The complainant appealed to the Court of Quarter Sessions at Ballymena. The appeal came before Judge Orr, sitting alone as Chairman of Quarter Sessions, on January 30th, 1905, whereupon it was contended that the acts charged against the defendants (the particulars of which are set out in the case stated, *infra*) did not amount to an offence within the section. Judge Orr yielded to the contentions put forward on behalf of the defendants, but agreed to state a case for the opinion of the King's Bench Division as to whether he was right or wrong in his view of the section. Accordingly, he made an order that the Justices' order be affirmed, with £2 for costs, to be paid by the complainant to the defendants, subject to a case stated for the opinion of the Court.

(1) 5 & 6 Vict. c. 106, s. 80: "And be it enacted, that no person shall throw, empty, or cause to run or flow, into any river or lake, any dye stuff or other deleterious or poisonous liquid, or shall throw into such river or lake any lime, spurge, or other deleterious or poisonous matter, or shall steep in such river or lake any flax or hemp; and if any person shall so offend, he shall forfeit and pay for every such offence any sum not exceeding ten pounds; provided always, that nothing in this Act contained shall extend or be construed to render any person liable to the penalties hereby imposed, for casting into any river or stream any dye-stuffs or other materials which are not of a deleterious nature, or which are not in a state poisonous to fish or other animals using the waters thereof."

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The case stated was filed in the office of the King's Bench Division, and came before the Court (Palles, C.B., Johnson and Kenny, JJ.) on June 6th, 1905, Mr. Hanna appearing for the complainant, and Mr. Conner, K.C., and Mr. Thompson for the defendants. It was objected on the part of the defendants—(1) that the case stated was irregular, inasmuch as it purported to have been stated by Judge Orr, as County Court Judge, whereas in fact he was exercising the jurisdiction of Chairman of Quarter Sessions; and (2) that there was no jurisdiction in the Chairman and Justices at Quarter Sessions to state a case.

Palles, C.B., dealt with the two objections raised in the following judgment.

PALLES, C.B.:—

We are all of opinion that one of the objections taken by Mr. Conner to the special case, in its present form, must prevail. The adjudication sought to be reviewed is one of the Court of Quarter Sessions, whilst the case is stated by the County Court Judge. Although he is *ex-officio* Chairman of Quarter Sessions, and, if sitting alone in that capacity, would constitute the Court, still, not even as Chairman, and much less as County Court Judge, is he the Court of Quarter Sessions.

The statutes referred to, and the Justices' Commission, do not touch the matter. Our jurisdiction to hear the case is not derived from any statute, nor from the power reserved in the Justices' Commission. It is, as explained in detail by Earl Cairns, L.C., Lord Penzance, and Lord O'Hagan in *Walsall* v. *London & North-Western Railway Company* (1), our Common Law jurisdiction of bringing before us by *certiorari* the decision of an inferior Court, and determining whether that decision was, or was not, made within jurisdiction.

As, however, there is no doubt that it was the Quarter Sessions who intended to state the case, the objection is one of the merest form. We shall, therefore, direct the case to be handed back to the solicitor, so that the intention of the Quarter Sessions shall be carried out, if it still desires to state the case.

(1) 4 A. C. 30.

Upon being informed that the case has been stated in proper form, we will grant an absolute order for a writ of *certiorari* on a motion without notice, and the case will be brought up by the return to that writ.

The case stated was accordingly taken off the file and handed back to the complainant's solicitor. The following is the case stated, as amended in pursuance of the leave given :—

Case stated by me, James Orr, acting Chairman of Quarter Sessions for the County of Antrim, Division of Ballymena, and the only Justice sitting at Quarter Sessions held for the said Division on the hearing of the above criminal appeal, for the opinion of the King's Bench Division of the High Court of Justice in Ireland, on certain questions of law hereinafter set out, at the instance of Andrew King, the complainant and appellant; defendants reserving their right to object to my jurisdiction to state a case.

The subject-matter of this case stated is a summons issued by the complainant, who is a fishery inspector, against the defendants, who are a limited company, carrying on the business of bleachers and finishers of linen, for that they, on the 11th August, 1904, at Craigs, in the county of Antrim, did cause certain deleterious or poisonous liquid to flow from their works at Hillmount into the river Maine. This summons was brought under section 80 of 5 & 6 Vict., chapter 106. The Justices at Petty Sessions dismissed it on the merits, and it came before the Justices sitting at Quarter Sessions, on appeal by the complainant. I was the only Justice who heard and adjudicated on the said appeal.

On the evidence, as given before me, I found the following facts :—

The construction of the defendants' works is correctly delineated in the maps prepared by Mr. Boyd and Mr. Ferguson, which accompany this case, and are to be taken as incorporated therewith. From these maps it appears that the mill, so far as water-power is concerned, is worked by two turbines and one breast-wheel. Turbine No. 2 and the breast-wheel are served by one and the

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same tail-race, called No. 2; but turbine No. 1 is served by a separate tail-race, called No. 1, which enters the Maine at a different point from No. 2. There is an overflow from No. 1 to No. 2, over which the surplus water from No. 1 is discharged into No. 2 when the sluice is closed down, and by-passes from No. 2 to No. 1, at points indicated on map, which are brought into use when required. The defendants, in the course of their business as bleachers of linen, first boil the cloth in a lime solution. The cloth is then steeped in a chloride of lime solution, the lime being merely a vehicle to contain the chlorine, which is the only poisonous ingredient in the substances used. This solution is put into a kieve for use, and from that into a vat, and passes through several vats in which the cloth is steeped, until the chlorine is practically exhausted. The cloth is then rinsed and washed, and the rinsings and washings are discharged into tail-race No. 1 at the points marked in map. From this effluent the chlorine is so completely abstracted that it is not in a state poisonous or deleterious to fish; but it contains, in suspension, considerable quantities of solids, principally carbonate of lime, sulphate of lime, calcium, chloride, alkaline salts, and organic matter, none of which are poisonous to fish.

When the river is so high that all three wheels are working, the effluent is carried down by tail-race No. 1 to the Maine, practically free from chlorine, and in a highly diluted state; but when there is not sufficient water for all the wheels, turbine No. 1 is shut off by closing a sluice at the point marked on map, thus practically converting tail-race No. 1 into a settling-pond, with an overflow into tail-race No. 2. By this means the solids are all collected and deposited at the bottom of the settling-pond, and the slight overflow is quite innocuous.

During the months of May, June, July, and until 11th August, 1904, the weather having been dry, and the river low, the sluice had been shut down, and tail-race No. 1 converted into a settling-pond, in manner aforesaid; and as the discharge from the vats flowed in, all the solids collected naturally at the bottom, and when the settling-pond filled up there was an overflow over the sluice into tail-race No. 2. During this period six samples were taken at the overflow, and six summonses issued in respect thereof, in

which I affirmed the dismisses at Petty Sessions, and no question arises in reference thereto.

But on the 11th August, 1904, in reference to which date this case is stated, as the result of heavy rains, there was a very large body of water, or fresh, as it is locally called, in the Maine, which, at this place, is a large and very rapid river, and there was at that time, lying in the bottom of tail-race No. 1, a large quantity of the accumulated deposit from the vats. On this date the defendants raised the sluices, and, by force of the rush of water through race No. 1, scoured out the settling-pond, and swept all the deposit in its passage down the tail-race by the water then coming through the by-passes into the river at the point marked on map.

On the scientific evidence, I find that the matter discharged from the settling-pond was not at any stage poisonous to fish, but was, when undiluted and when leaving the settling-pond, highly deleterious to them, by depriving the water of the necessary oxygen, and so rendering it unable to sustain fish-life, and that the discharge would render deleterious to fish-life a volume of water at least one hundred times its size; but, having regard to the heavy fresh in the river, and the large volume of water therein, I formed the opinion that the discharge, at the instant of its getting into the Maine, became so largely diluted as to cease to be deleterious to fish; and, having regard to the proviso at the end of section 80, 5 & 6 Vict., chapter 106, I held, as a matter of law, that the point at which it was to be determined whether the discharge was deleterious or not, was immediately after it entered the waters of the river, and I, accordingly, dismissed the summons for that date (11th August), subject to a case to be stated. The question for the decision of the Court is whether I was right in so deciding.

If the above question is answered in the affirmative, the dismiss is to stand confirmed; but if in the negative, the Court will be pleased to remit the case to the Court of Quarter Sessions at Ballymena, to proceed thereon, according to law, with such directions as may be considered necessary.

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Mr. Hanna, on the part of the complainant, applied *ex parte*, on June 16th, 1905 (1), for a writ of *certiorari* to bring up the order of Quarter Sessions of January 30th, 1905, with the case stated incorporated in it, for the purpose of having it quashed. The Court forthwith granted an absolute order for a writ of *certiorari*. The command in the writ of *certiorari* was as follows :—

"We, being willing for certain reasons that all and singular orders and adjudications made by you, or some or one of you, at the Quarter Sessions of the Peace, held at Ballymena, in said county, on the 30th day of January, 1905, on appeal from the order made at the Ballymena Petty Sessions district of said county on the 7th October, 1905, on the hearing of a complaint designated :

"Andrew King, Fishery Inspector, *complainant*;

"Frazer & Haughton (Limited), *defendants*.

"Said adjudication at Quarter Sessions ordering that the Justices' order of dismissal above referred to be affirmed, with £2 for costs, to be paid by appellant to respondent, subject to case stated for opinion of the Court, and also the said special case (as is said), be sent by you before us, do command you, and every of you, that you, or one of you, do send forthwith, under the seals of you, or one of you, before us in the King's Bench Division of our High Court of Justice in Ireland, at Dublin, all and singular the said orders and adjudications and the said case stated, with all things touching the same, as fully and perfectly as they have been made by you, or some or one of you, and now remain in your custody or power, together with this our writ, that we may cause further to be done thereon, what of right and according to law and custom we shall see fit to be done."

His Honor Judge Orr, on July 14th, 1905, returned the following orders and adjudication (together with the case stated, set forth above)—

(1) Before PALLES, C.B., and JOHNSON and KENNY, JJ.

PETTY SESSIONS (IRELAND) ACT, 1851, 14 & 15 VICT. c. 93.

(FORM H)—APPEAL.

ANDREW KING, Fishery Inspector, Toombridge, *Complainant.*

FRAZER & HAUGHTON, Limited, Hillmount, *Defendants.*

Petty Sessions District of Ballymena. County of Antrim.

I certify that upon the hearing of a complaint that the defendants, on the 11th day of August, 1904, at Craigs, in the County of Antrim, did cause a certain deleterious or poisonous liquid to flow from their works at Hillmount into the River Maine, an order was made on the 7th day of October, 1904, by the Justices present, against the said FRAZER & HAUGHTON, Limited, of Hillmount, to the following effect:—defendants' name amended by consent to FRAZER & HAUGHTON, Limited, and the charge dismissed on the merits.

(Signed,) A. CARUTH,
Justice of the said County.

This 10th day of October, 1904.

The person against whom said order was made hereby appeals against the same to the next Court of Quarter Sessions, to be held at Ballymena.

(Signed,) ANDREW KING,
Appellant.

This 8th day of October, 1904.

I certify that Notice of said Appeal was duly given to me, and that the said appellant has duly entered into a recognizance to prosecute said Appeal.

(Signed,) WILLM. MEHAFFEY,
Clerk of above Petty Sessions.

This 10th day of October, 1904.

I certify that upon the hearing of said Appeal, on the 30th day of January, 1905, the Court of Quarter Sessions ordered that the Justices' order of dismiss above mentioned be, and the same was, affirmed, with £2 for costs, to be paid by the appellant to the respondents, subject to case stated for opinion of Court.

(Signed,) H. M'N. M'CORMICK,
Clerk of the Crown and Peace for the County of Antrim.

This 31st day of January, 1905.

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The case was fully argued on October 27th, 1905, before LORD O'BRIEN, L.C.J., MADDEN and WRIGHT, JJ., whereupon the Court reserved judgment. Subsequently, by directions of LORD O'BRIEN, L.C.J., a Special Court was constituted for determination of the important questions arising in the case. The Special Court consisted of LORD O'BRIEN, L.C.J., PALLES, C.B., GIBSON, MADDEN, and WRIGHT, JJ.

Hanna (with him, *Ronan, K.C.*), for Andrew King, the complainant in the summons:—

The offence contemplated by the section is committed by the act of throwing deleterious liquid into the river. The act, so constituted an offence, is independent of any process of dilution which goes on after the deleterious matter enters the river. In *The Joint Committee of the River Ribble* v. *Halliwell* (1) the construction contended for was put upon the 2nd section of the Rivers Pollution Prevention Act, 1876. That section prohibits the putting, or causing, or knowingly permitting to be put, or fall into any stream, so as to pollute its waters, "any putrid solid matter," and by sect. 20 of the Act "solid matter" shall not include particles of matter in suspension in water. There it was held, both in the Queen's Bench and Court of Appeal, that the offence was putting into the river "putrid solid matter," that is to say, solid when it was first put into the river. That case was followed in *The West Riding of Yorkshire Rivers Board* v. *Rawson* (2). A case that supports the proposition contended for is *The Queen* v. *Cluderay* (3), in which a man administered two *cocculus indicus* berries entire in the pod to a child, with intent to murder the child. The kernel is a poison, the pod is not, and will not dissolve in the stomach; the berries were therefore harmless. It was held there that administering poison with intent to murder was proved, because the Court would not take into consideration that the poison was accompanied by something which prevented it from acting.

There is power in the Chairman and Justices at Quarter Sessions to acquit, subject to a case stated; and the procedure

(1) [1899] 1 Q. B. 27; [1899] 2 Q. B. 385. (2) 89 L. T. (N. S.) 363.
(3) 19 L. J., M. C. (N. S.) 119; 2 Car. & K. 909.

adopted here is the procedure that was adopted in *Overseers of the Poor of Walsall* v. *London & North-Western Railway Company* (1). Lord Penzance, at page 43 of the report, defines the jurisdiction of the Queen's Bench Division in the matter as being not purely consultative but judicial. It was found that, even at a time when the Court of Quarter Sessions was in the habit of consulting the Judge of Assize when there was a doubt upon a question of law, the Court of Queen's Bench exercised the jurisdiction of quashing any order of a Quarter Sessions for any insufficiency which appeared upon the face of it. Here the order of Quarter Sessions incorporates the case stated, and the acquittal is subject to the case stated. Therefore if the grounds set out in the case stated are insufficient, the order should be quashed. We submit that the grounds of acquittal set out in the case stated are insufficient and bad for the reasons already specified. The right to bring up, on *certiorari*, an acquittal of the Quarter Sessions is established by *R.* (*M'Grath*) v. *Chairman and Justices of Clare* (2). There is also power to order the case, when the acquittal is quashed, to be re-heard by the Quarter Sessions: *King* v. *Bloxam* (3); see also Hales' Pleas of the Crown, vol. ii., p. 210, upon the use of a *certiorari*, and Comyn's Digest (5th ed.), vol. ii., p. 332 (A 1), upon "When *certiorari* lies." *Certiorari* is taken away in the Fishery Code in respect of conviction by 5 & 6 Vict. c. 106, sect. 68, and 13 & 14 Vict. c. 88, sect. 50; but there is no section taking away *certiorari* in respect of an acquittal. [*King* v. *Ridgway* (4), *King* v. *Allen* (5), *Queen* v. *Justices of Antrim* (6), *R.* (*Drohan*) v. *Chairman and Justices of Waterford* (7) were also referred to.]

Thompson and *Conner, K.C.* (with them *Patchell, K.C.*), for the defendants:—

The volume of water in the river, and its powers of diluting the deleterious substance, must be taken into consideration. If the fact be that, by reason of these two things, the matter was never deleterious in the river, the offence has not been committed.

(1) 4 A. C. 30.
(2) [1905] 2 I. R. 510.
(3) 1 Ad. & Ell. 386. [527.
(4) 1 Dowl. & Ry. 132; 5 B. & Ald.
(5) 15 East, 333.
(6) [1895] 2 I. R. 603.
(7) [1901] 2 I. R. 548.

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What the County Court Judge has found is that the deleterious matter became diluted in the water without any interval appreciable or cognisable at law. If there was an instant during which it was deleterious in the river, you cannot take instants into account. The finding is tantamount to this, that the stuff was never administered in sufficient quantities to be deleterious.

The defendants have been acquitted, and the maxim *Nemo debit esse bis vexari* applies. No doubt the acquittal was by a speaking order; but the only effect of that is to give the reasons for the acquittal. It is no more than if the Judge had said—"I acquit, but I should like a little parental advice from the Court as to whether I was right or wrong." *The Overseers of Walsall* v. *The London & North-Western Railway Company* (1) decides that the Court cannot bring up such an acquittal by *certiorari*. [The following cases were referred to: *The Queen* v. *Middlesex Justices* (2), *R.* (*Drohan*) v. *Chairman and Justices of Waterford* (3), *Queen* v. *Justices of Antrim* (4), *Chantrell's Case* (5).]

Ronan, K.C. in reply:—

As to whether the offence has been committed, the question is what was put in, and not what was the saving agency of the thing it was put into.

This order is bad on its face; it is waste paper. Such an order, even if it were never quashed on *certiorari*, would not entitle the accused, on a subsequent prosecution, to plead, *Autrefois acquit*. That being so, no difficulty can arise by reason of the maxim, *Nemo debit esse bis vexari*, &c. It is a speaking order, bad on its face; and any one of the King's subjects is entitled to come into the King's Bench and ask to have it quashed. There is an appeal pending at Quarter Sessions which has not been disposed of according to law, and this Court should order that Quarter Sessions do dispose of it, according to law.

Cur. adv. vult.

(1) 4 A. C. 30.
(2) 2 Q. B. D. 519.
(3) [1901] 2 I. R. 548.
(4) [1895] 2 I. R. 605.
(5) L. R. 10 Q. B. 587.

Before judgment was delivered, Lord O'Brien, Lord Chief Justice of Ireland, forwarded to Lord Alverstone, Lord Chief Justice of England, a memorandum requesting information as to the prevailing practice in England, in cases stated by Courts of Quarter Sessions. Lord Alverstone's memorandum in reply was as follows:—

"ROYAL COURTS OF JUSTICE, LONDON,
"1*st December*, 1905.

"A simple answer to the questions enumerated at the end of the Memorandum enclosed in the letter of The Lord Chief Justice of Ireland, of November, will not, in my opinion, give exactly the information which appears to me to be desired. I will, however, answer the questions in the first instance, and then add some supplementary observations which will, I trust, cover the ground of the inquiry.

"1. In the case of an acquittal by Quarter Sessions, subject to a case stated, if, in the opinion of the Court, upon such case the accused ought to have been convicted, the Court, when acting under its Common Law jurisdiction, would have quashed such acquittal.

"2. If the acquittal was quashed, the Court did not remit the case to Sessions to proceed to determine the appeal, treating it as open and undetermined; the only judgment pronounced was one confirming or quashing the order or conviction appealed against. The decision in the case of *Rex* v. *Bloxam* has been followed in subsequent cases; but, for the reasons which I will state in my Memorandum, that case has little, if any, direct bearing upon the point under discussion.

"A copy of the order in *Rex* v. *Bloxam* is sent herewith (1).

(1) *Saturday, the 27th day of April*, 1833.

IN THE COURT OF KING'S BENCH.

Warwickshire.

THE KING
v.
RICHARD ROUSE BLOXAM, D.D.

Upon hearing Counsel on both sides, It is ordered that the orders returned with the Writ of *Certiorari* in this prosecution be sent back to the Sessions to be re-stated.

Mr. Amos, for the prosecutor. *Mr. Hill*, for the defendant.

BY THE COURT.

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"I desire to supplement the answers which I have given to the questions, specifically submitted to me, by a few observations.

"The practice of stating cases from Quarter Sessions at Common Law, as apart from statute, has arisen, as the framers of the Memorandum are well aware, out of the ancient direction in the Commission to the parties to take the opinion of the Judge of Assize. Owing to the inconvenience of that course, there arose the practice of stating a special case for the opinion of the Court of King's Bench.

"Prior to the Judicature Act of 1894, it had become the settled practice of the Court of King's Bench not to consider or express an opinion upon a special case, unless the order or conviction appealed from finally disposed of the matter.

"The cases of *R.* v. *Kesteven* ([1844] 3 Q. B. 810), *R.* v. *Marton cum Grafton* ([1847] 10 Q. B. 971), *R.* v. *Sutton Coldfield* ([1874] L. R. 9 Q. B. 153), and *R.* v. *Skinner* [1884], are instances of the application of this rule, and many other cases may be found, although, as appears from the reports, attempts had been made from time to time to induce the Court of King's Bench to interfere, and entertain a case which only dealt with the matter interlocutorily.

"The Rule of Law is, in my opinion, correctly stated at p. 175 of Short and Mellor's Crown Office Practice.

"I send herewith a note of the case of *R.* v. *Skinner* in 1884, which is not reported (1).

"I may further point out that the argument based upon this

(1) *Tuesday, 4th March*, 1884.—*Coram* LORD CHIEF JUSTICE and LOPES, J.:

REGINA *v.* SKINNER.

This was an application for direction to the Master of the Crown Office to take and file a case stated upon an order of Sessions, he having refused to do so under the following circumstances:—The Licensing Justices had refused to renew a license, the appellant contending that in law they were bound to renew. No application was made for a mandamus, to hear and determine according to law; but the applicant appealed to Quarter Sessions, who heard further evidence, and made an order dismissing the appeal, subject to a case, which provided that if the Court should be of opinion one way the order dismissing the appeal was to be confirmed, but if the other way the license was to be granted by the Quarter Sessions, which could only be done by the order

principle is clearly stated in the judgment of Lord Cairns in the case of *The Overseers of Walsall* v. *London & North-Western Railway Co.*, at pp. 39–42 of 4 App. Cas., and accepted by him as one of the grounds of his judgment in that case.

"The fact that the Court of Queen's Bench was, in consequence of this well-established principle, fettered in its action and unable at times to do full justice, had been pointed out on more than one occasion; see, among others, the note in *Reg.* v. *Skinner*; and it was mainly in consequence of this result that sub-sect. 2 of sect. 2 of the Judicature Act, 1894, was passed to enable the Court of Queen's Bench to make the order which the Court of Quarter Sessions might have made, or to remit the case, if necessary, for a re-hearing.

"Side by side with this jurisdiction of the Court of King's Bench there was the jurisdiction to quash by *certiorari*, and to compel a re-hearing by mandamus on various grounds, which it is not necessary here to discuss. *Rex* v. *Bloxam* ([1834] 1 Ad. & E. 386) was an instance of the exercise of that kind of jurisdiction. It followed *R.* v. *Ridgway* ([1822] 5 B. & Ald. 527), and it has not been infrequent when rules for a *certiorari* have been granted, if there has not been a proper hearing, to direct a hearing by mandamus, or otherwise, or at times to order cases to be re-stated if the point was not sufficiently raised.

"These authorities in no way affect the principle upon which the Court of King's Bench acted before the Statute of 1894, in cases stated by Sessions, where no application had been made for a *certiorari*.

"ALVERSTONE, C. J."

being sent back to the Sessions, and amended in accordance with the opinion of this Court. The Court, on the authority of *Regina* v. *Sutton Coldfield* (L. R. 9 Q. B. 153) and other cases, refused the application on the ground that this Court has no authority to amend or alter the order of Quarter Sessions, and could only quash or confirm it, and could not send it back to the Sessions; and that the Sessions, having made the order, are now *functus*.

Per Lord Chief Justice: I am sorry we have no power to do what, in one point of view, would be just; but the Legislature has not given this Court the power to help you.

[Copy of the Master of the Crown Office's minute, taken in Court on Tuesday, 4th of March, 1884.]

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WRIGHT, J. :—

This was a case stated by the Chairman of Quarter Sessions for the county of Antrim for the opinion of this Court, at the instance of Andrew King, complainant and appellant. The summons, which was brought by King, a fishery inspector, under section 80 of the 5 & 6 Vict. c. 106, charged the defendants, who are a limited company and carry on the business of bleaching and finishers of linen, that they, on the 11th August, 1904, at a place therein specified, "did cause a certain deleterious or poisonous liquid to flow from their works at Hillmount into the River Maine." The Justices at Petty Sessions dismissed the summons on the merits, and the complainant having appealed from the dismiss to Quarter Sessions (under section 100 of the 5 & 6 Vict. c. 106), the Chairman of Quarter Sessions, Judge Orr, who sat alone, dismissed the appeal; but, at the instance of the complainant, stated this case for the opinion of the King's Bench Division, the defendants reserving their right to object to his jurisdiction to state a case.

The case is one of considerable importance to mill-owners, on the one hand, and to Boards of Conservators and the general public, on the other hand. In the case stated the facts are set out very fully and very clearly. In the course of the defendants' business, the linen is steeped in chloride of lime which contains chlorine—a poisonous ingredient; the rinsings and washings are discharged into a tail-race, identified on the map incorporated with the case as tail-race No. 1, and after passing through this tail-race find their way into the River Maine. The summons in the present case is in respect of what was done by the defendants on the 11th August, 1904. On that date, as appears by the statement of facts in the case stated, there was lying in the bottom of tail-race No. 1, between two points marked on the map, a large accumulation of deposit from the vats. The defendants raised the sluices at certain points, and, by force of the rush of the water, swept all the deposit so accumulated, diluted in its passage down the tail-race, into the River Maine at a point marked on the map. The Chairman has found as a fact that the matter discharged from the settling pond, *i.e.*, portion of the tail-race No. 1, was not at any stage poisonous to fish, but was, when undiluted and when leaving the settling pond,

highly deleterious to them by depriving the water of the necessary oxygen, and so rendering it unable to sustain fish-life.

If the summons in this case had been for causing deleterious liquid to flow into this tail-race, which is an artificial water-course flowing into the River Maine, it would seem reasonably clear on the evidence, having regard to the language of the definition in section 113, which provides that the word "river" shall extend to all streams and water-courses, that an offence under the section had been committed, and the defendants should have been convicted. But the summons is not so framed, and although an attempt was made on the first hearing of this case to seek to obtain a conviction on this reading of the summons, this attempt has not been persisted in, and the argument has been confined to the acts of the defendants in reference to the River Maine itself, *i.e.*, the natural river, as distinguished from any artificial cuts or channels.

In reference to the river, the case stated finds as follows: "The discharge would render deleterious to fish-life a volume of water at least 100 times its size; but, having regard to the heavy fresh in the river and the large volume of water therein, I formed the opinion that the discharge at the instant of its getting into the Maine became so largely diluted as to cease to be deleterious to fish; and, having regard to the proviso at the end of section 80, 5 & 6 Vict. c. 106, I held, as a matter of law, that the point at which it was to be determined whether the discharge was deleterious or not was immediately after it entered the waters of the river, and accordingly I dismissed the summons."

There has been considerable discussion before us as to what exactly the Chairman found in fact, and there is some apparent ambiguity in his language—or rather he has expressed himself in slightly contradictory terms, if his language is to be taken literally. The discharge, he finds in one part of the case, became so largely diluted *at the instant* of its getting into the Maine as to cease to be deleterious to fish; a few lines later on he says that he held that the point of time at which it was to be determined whether the discharge was deleterious or not was *immediately after* it entered the waters of the river. The language is somewhat inexact, but the meaning I think is plain. In my opinion the

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Chairman has found in fact that the noxious or harmful properties and character of the discharge were killed or annihilated at the instant of contact with and absorption in the waters of the river, which, according to the statement of facts in the case, is at this place a large and very rapid river, and in which on the date in question, August 11th, 1904, there was a very large body of water—or fresh—and that its presence in the water was innocuous. I read his finding as a finding in fact that for no appreciable time or space after it mingled with the River Maine was this deposit or discharge harmful or deleterious. Taking this as the finding in fact, was the Chairman right in holding that no offence had been committed within the 80th section? The section prohibits persons under a penalty not exceeding £10 from throwing, causing to flow, &c., into a river or lake dye-stuff, or other deleterious or poisonous liquid, or lime, spurge, or other deleterious or poisonous matter; and, by a curiously worded proviso at the end of the section, it is enacted that nothing shall extend or be construed to render any person liable to the penalties thereby imposed for casting into a river or stream dye-stuffs, or other materials which are not of a deleterious nature, or which are not in a state poisonous to fish or other animals using the waters of the river or stream.

The latter portion of the section, *i.e.*, the proviso, would appear to be almost superfluous, and a repetition of the earlier portion.

The object of this, as of other sections of the Act, and, indeed, of the Fishery Acts generally, is the preservation of fish, and the prohibition and prevention of illegal methods of capturing and killing them. Similar language will be found in sect. 36 of the 13 & 14 Vict. c. 88. This is the object and general policy of the Fishery Acts, and the section in question prohibits throwing, &c., into a river or stream certain specified things, *i.e.*, lime and spurge, which, I presume, are known to be injurious to, or destructive of, fish-life, and the absolute prohibition against throwing into a stream these known injurious substances is quite intelligible; further, the section generally prohibits the throwing into a river or stream of dye-stuffs or other liquids or matters of a deleterious or poisonous nature. I read this as meaning liquids or matters, the presence of which in the water would be injurious to fish.

I do not think it means liquids or matters which, in themselves, and apart from the conditions existing at the time when the act complained of was committed, are injurious or noxious. In my opinion, it means something which, under the existing conditions of time and place, would be likely to injure the fish of the river. Substances, innocent in themselves, might be thrown into a stream in such large quantities as to be injurious to fish-life, and, surely, these would come within the prohibition of the section.

The Chairman here might have found that for an appreciable period of time, and over a not inconsiderable stretch of the river, the deposit, so introduced, had not lost its noxious or harmful qualities, in which case it would have been his duty to convict and impose a fine. But he has found the exact opposite—he has found that its power for evil was at once, at the instant, and by the fact of its being let into this large and rapidly-flowing body of water, destroyed, and it became innocuous. Taking this finding of fact, and having regard to the general policy of the Act, and the language of the section, I am of opinion that no offence within the section was committed, and that the summons was rightly dismissed.

I have only shortly to express my opinion on one other matter, which was argued before us, namely, does case stated lie from a dismiss at Quarter Sessions? As to this, it seems to be clear that where there has been a dismiss or acquittal by Quarter Sessions, subject to a case stated, if, in the opinion of the Court, upon such case the accused ought to have been convicted, the Court, acting under its Common Law jurisdiction, will quash such acquittal or dismiss. The Court will not remit the case to Sessions, but will simply quash it; it will not, in the words of Lord Cairns, in the *Walsall Case* (1), "substitute another order in its place, but will remove that order out of the way"; and I would refer, without quoting them, to pages 40 and 41 of Lord Cairns' judgment in that case, and we have it under the hand of the Lord Chief Justice of England, in a very full and luminous memorandum kindly furnished by him to this Court, that this has long been the English practice. This is a question of general interest and importance,

(1) 4 A. C. at p. 39.

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and c to it there is no difference of opinion among the members of the Court. Accordingly, it follows that, if, on the facts stated in the case, the dismiss was wrong, this Court has power, by order, to quash it.

But, for the reasons already stated, I am of opinion that the summons was rightly dismissed.

A further question arises in the case, a question which has not been argued before us, but as it appears on the statement of the facts of the case, and has, I am informed, been argued in a subsequent case (not yet decided), it cannot be passed over, namely, are the defendants, who are described as a limited company, liable to be summoned under sect. 80 of 5 & 6 Vict. c. 106?

I am clearly of opinion that they are liable; and I come to this conclusion, not merely from the language of the interpretation section (sect. 113), which enacts that the word "person" shall extend to all bodies politic, corporate, aggregate, or sole, and also to any number of persons associated together as a company or partnership, but also from the decision in the case of *Pearks, Gunston & Tee, Limited*, v. *Ward* (1), in which I concur, and in particular I rely upon the judgment of Mr. Justice Channell, at page 11, where he points out the distinction between criminal offences properly so called, in which it is essential that there should be something in the nature of a *mens rea*, and *quasi* criminal offences, that is to say, where, as here, certain acts are forbidden by law under a penalty. In the latter class of cases, as he points out, the offender, if the act has been done, is liable to a penalty whether he had any *mens rea* or not, and whether or not he intended to commit a breach of the law, and, on principle, a corporation would be liable just as well as an individual.

On this question I entertain no doubt, nor, I believe, does any member of the Court.

MADDEN, J.:—

I shall shortly state the grounds of the judgment which I have formed upon the only question upon which there is a difference of opinion between the members of the Court. In my opinion the

(1) [1902] 2 K. B. 1.

facts stated and found by the learned County Court Judge disclose no offence committed in the River Maine, as the term is employed in the case with which we have to deal. I am careful to guard myself thus, as I am clearly of opinion that the tail-race of the mill is a "river" within the meaning of the Irish Fisheries Acts, and I am also disposed to think that the entire series of water-courses from the River Maine might have been treated as part of that river for the purposes of this Act. This, however, has not been done, and I refer to these matters to show the limited effect of the conclusion at which I have arrived.

The offence charged against the defendant in the summons is "causing a certain deleterious or poisonous liquid to flow from their works at Hillmount into the River Maine." This prosecution is brought under the 80th section of the Irish Fisheries Act of 1842 (5 & 6 Vict. c. 106), which enacts that "no person shall throw, empty, or cause to run or flow into any river or lake, any dye-stuff or other deleterious or poisonous matter, or shall throw into such river or lake any lime-spurge, or other deleterious or poisonous matter, or shall steep in such river or lake any flax or hemp." If the section had stopped there, it would have prohibited absolutely the introduction into any river or lake of certain substances—(*a*) those expressly named, viz. dye-stuff, lime, spurge, flax, or hemp; and (*b*) any other liquid or matter which could be proved to be either deleterious or poisonous. It was, however, noted (possibly during the passage of the bill through committee) that although the other things enumerated were, in their nature, necessarily deleterious or poisonous, this was not universally the case with dye-stuffs. A proviso was accordingly inserted exempting from the operation of the section persons casting into a river or stream "any dye-stuff or other materials which are not of a deleterious nature, or are not of a state poisonous to fish or other animals using the waters thereof." This proviso does not seem to be directly applicable to the present case. But it is of significance in so far as it suggests the mischief which the section was intended to prevent. This is, I think, the effect of the view expressed by Wright, J., and adopted by Coleridge, C.J., in regard to a somewhat similar enactment: *United Alkaline Company* v. *Simpson* (1).

(1) [1894] 2 Q. B. 116.

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Now the stuff discharged by the defendants into the Maine, so far as it could be regarded as deleterious, consisted of particles of solid matter held in suspension in the water of the tail-race. These are found to consist chiefly of carbonate of lime, sulphate of lime, calcium, chlorine, alkaline salts and organic matter, none of which are poisonous to fish. It is found as a result of the scientific evidence that the presence of these particles in water, in a certain proportion, renders it highly deleterious "by depriving the water of the necessary oxygen, and so rendering it unable to support fish-life." This matter in solution is not in itself deleterious, but the liquid in which it is found in certain proportions has this character, and the offence charged is the discharge into the river, not of deleterious matter, but of a deleterious liquid. The effluent, as discharged from the settling pond, was highly deleterious. It became less so according as it was diluted by the water carried down by the head-race. I will assume that the water during the entire of its progress down the tail-race, and up to the moment of its discharge into the River Maine, retained its deleterious character. But we are not concerned, in the case before us, with the contents of the tail-race. Was any deleterious liquid caused to flow into the river? This is a question of fact, which, in my opinion, is determined by the finding of the County Court Judge that the discharge from the tail-race, "at the instant of its getting into the Maine, became so largely diluted as to cease to be deleterious to fish." He adds that he held as a matter of law that the point at which it was to be determined whether the discharge was deleterious or not was immediately after it entered the waters of the river. His reference to the proviso, which I have quoted, does not affect his finding on the question of fact; and I think his conclusion of law is correct, independently of the proviso. The antecedent condition of the discharge is immaterial. If it is innocuous in the river, as liquid or as solid, no offence has, in my opinion, been committed. I do not read the finding of the County Court Judge to amount to a determination that the discharge, deleterious when allowed to run into the river, became afterwards diluted and innocuous. The deleterious character of the fluid depending on the relation of the matter in suspension to the volume of water, I interpret his statement,

read as a whole, to amount to a finding that at no period of time, from and after the contact of the discharge with the body of the water contained in the River Maine, was there such a proportion of matter present in the river as to render "deleterious" what was discharged from the tail-race. In other words, that no "deleterious" liquid was allowed to pass into the river.

I fully realise the danger of pollution which might result from the entry into a river of a number of discharges from mills, each of which, taken separately, might be innocuous. But the statute has been framed so as to enable the Conservators to preclude this danger. They have only *petere fontes*. The definition of "river" in the 113th section of the 5 & 6 Vict. c. 106 is very wide, extending to "all streams and water-courses." By putting the law in force as regards all tributary streams and water-courses, including tail-races, they can secure the immunity of the principal river. But if they choose to challenge the purity of the discharge from any particular water-course at the moment when it enters the main body of the river, and fail to prove that it enters the river in a deleterious condition, their case, in my opinion, breaks down. It is satisfactory to my mind to know that the conclusion at which I feel obliged to come, in this particular case, having regard to the finding of the County Court Judge, will place no difficulty in the way of the general enforcement of the provisions of the Fisheries Acts, if brought into operation under different circumstances.

GIBSON, J.:—

Section 80 forbids the doing of the specified act without reference to the intent of the offender, or the consequences of the act done. It applies to all rivers, large and small, irrespective of the volume of water they discharge. The object was no doubt to protect fish and river animals, but the section excludes from the Magistrates' consideration any question of the results of the prohibited act, which in case of several contributory riparian wrongdoers might involve a perplexing and uncertain inquiry. If the act would be criminal in fair weather when a river was low, it does not become innocent because a rainfall causes a flood. To throw in lime or spurge is made absolutely unlawful, irrespective of effect.

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But for the proviso, the same observation would apply to any dye-stuffs, but the proviso restricts dye-stuffs to those of a deleterious nature, or in a state poisonous to fish or river animals. If the introduction of dye-stuff of such nature or in such state, lime or spurge, is absolutely prohibited without regard to actual effect, it would seem that the introduction of matter of a deleterious or poisonous nature was equally forbidden. The word "other" indicates this. None of the authorities cited governs the case, but the reasoning in *Reg.* v. *Cramp* (1), adopted in Stephen's Digest of Criminal Law, p. 173, and *R.* v. *Cluderay* (2), goes to support my conclusion. The tendency of the introduction of lime, &c., is assumed by the section to be injurious to fish, and if the quantity is substantial, not infinitesimal, the offence is complete when the act is done, though no harm results. My opinion is based on the section as a whole. If the word "deleterious" alone was used without any assisting context, it might well be argued that what was contemplated was the effect. But the scope and context of the section appear to exclude this view.

Under 13 & 14 Vict. c. 88, sect. 36, the possession of deleterious matter (treated therein as equivalent to poisonous matter) on the bank of or near a river is made an offence. The section makes the purpose of such possession material, but says nothing of quantity, or of the volume or dimensions of the river. It is unlike section 80, now under consideration, which is a universal prohibition apart from wilfulness or intent: *Smith* v. *Barnham* (3). The section is much stronger than the statute before the Court in *Simpson's Case* (4). The tendency of the unlawful act is assumed as the basis of prohibition, and the remarks of Wright, J. (in which Coleridge, C.J., concurred), have little bearing on section 80. Cases might be put where, on my construction, a prosecution would be preposterous, for example, if a bottle of whiskey was accidentally dropped into the Shannon by a fishing party, or a bag of lime fell out of a barge. The section, however, was directed to a well-known mischief of common occurrence, not to exceptional casualties for which no one would dream of prosecuting. The main object of

(1) 5 Q. B. D. 307.
(2) 1 Den. 514.
(3) 1 Ex D. 419.
(4) [1894] 2 Q. B. 116.

the section cannot be defeated by a suggestion of remote speculative difficulties. The complaint here was within the mischief which was intended to be prevented.

A question was raised whether any case could be stated by Quarter Sessions at Common Law in reference to a dismiss on the merits, and what was the nature of the jurisdiction of the Court upon such case. As there was no example of the kind in Ireland (where cases stated from Quarter Sessions have been hitherto unknown), we inquired as to the English practice, and have been informed by Lord Alverstone that under the Common Law practice, before it was altered by recent legislation, such a case could have been stated, and would have been entertained by the Court. As the Common Law is the same in the two countries, and there is no statute on the subject here, we must follow what was the course of the Court in England. The practice appears correct in principle. The order of Sessions, which must be final in character (*Reg.* v. *Sutton Coldfield* (1)), incorporates the facts stated in the case; it resembles a special verdict: *Reg.* v. *Dickenson* (2); it is in the nature of a judgment *nisi*: *Reg.* v. *Staffordshire Justices* (3). If judgment in favour of the accused on a special verdict can be questioned on error, as was assumed by the House of Lords and Queen's Bench in the cases mentioned in my judgment in the *Clare Case* (4), *a fortiori* can an order expressly made subject to a case be similarly quashed, as was apparently done in *Reg.* v. *Bloxam* (5). The ancient and established practice in England is decisive. The course of the Court settles the law. We must, therefore, quash the order of dismissal, conditionally pronounced below subject to this case, as upon the facts stated the offence charged results as a necessary legal consequence.

Can the Court remit the case back to the Sessions, to deal with the appeal and substitute a conviction? From the English practice it appears that this cannot be done. The prosecution is spent, and the function of the Sessions is at an end. *R.* v. *Ridgway* (6) decides that, in reference to a preliminary point—if a case can be

(1) L. R. 9 Q. B. 153.
(2) 7 E. & B. at p. 836.
(3) *Ibid.* at p. 939.
(4) [1905] 2 I. R. at p. 521.
(5) 1 A. & E. 386.
(6) 5 B. & Ald. 527.

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stated upon such a point—the case may be sent back to be disposed of on the merits; but a decision on the merits, though quashed, exhausts the powers and jurisdiction of the Sessions. This is in accordance with the practice in error: *Reg.* v. *Houston* (1); *R.* v. *Bourne* (2); *Reg.* v. *Silversides* (3).

The case, therefore, so far as it asks the Court, if the question put is answered in the negative, to remit the case with directions, is erroneous. But, as the decision below was final, the addition of this request does not bring the case within the authority of *Reg.* v. *Kesteven* (4) and the *Sutton Coldfield Case* (5), so as to compel the Court to decline to deal with the case. The Sessions, completely and finally, disposed of the appeal; and the only effect of the case stated was to make the adjudication defeasible on the principle explained in the *Wallsall Case* (6).

Whether, if no case was stated, an acquittal on the merits, on its face erroneous, could be quashed on *certiorari*, is not before us for decision. Such an acquittal would be of rare occurrence, and, as no mandamus to re-hear the appeal would be competent, the point is chiefly of speculative interest. The jurisdiction on *certiorari* is not quite the same as that in error. But for the cases where error was allowed at the instance of a prosecutor—by which we may be bound, as the point, though not argued, could hardly have been overlooked—I should have inclined to the opinion that error lay only for an accused person, not against him. There may be a distinction between an acquittal which, though on its face erroneous, could only be questioned by an independent substantive proceeding. The only cases at all bearing on this question that I can discover are *R.* v. *Reason* (7); *R.* v. *M'Nicholas* (8); *R.* v. *Murray* (9); *R.* v. *Hennessy* (10); and *R.* v. *Spencer* (11). I only notice the point lest it should be supposed that my judgment covers it.

As no case can be stated at Common Law in respect of a

(1) 4 I. L. R. 174.
(2) 7 A. & E. 58.
(3) 3 Q. B. 406.
(4) 3 Q. B. 810.
(5) L. R. 9 Q. B. 153.
(6) 4 A. C. 30.
(7) 6 T. R. 375.
(8) 3 Ir. L. Rec. (N. S.) 190.
(9) *Ibid.*
(10) 2 H. & Br. 373.
(11) 9 A. & E. 485.

conviction where *certiorari* is taken away (as under the Fishery Acts) (*Reg.* v. *Chantrell* (1)), a question like the present will be hardly likely to occur often, as a prosecutor will not care to ask for a case to quash an acquittal, where, if he succeeds, he could not obtain a conviction in that prosecution. The question of our jurisdiction to entertain a case arising on an acquittal is, however, of obvious importance, as a prosecutor might desire to have the law authoritatively pronounced for his future protection, even though he does not contemplate renewing the prosecution.

No objection was taken on the ground that the defendants were a limited company. The statute 5 & 6 Vict. c. 106 expressly extends the definition of "person" to corporations, and in many sections, of which sect. 80 is one, if a corporation could not be prosecuted the beneficial operation of the enactment might be frustrated. The section excludes the element of guilty intent, and *Peark's Case* (2), and the opinion of Bowen, L.J., in the *Tyler Company Case* (3), are in point. The only difficulty is as to procedure in reference to service and recognizances as a condition to appeal. No question now arises on these. As to recognizances, I may refer to *Cortis's Case* (4) and *Reg.* v. *Manchester* (5). Procedure must be accommodated to rights rather than rights sacrificed to procedure.

PALLES, C.B.:—

Those interested in the due administration of the law in Ireland ought to feel under an obligation to the learned County Court Judge for the adoption, for the first time, I believe, in this country, of the practice, which has for some centuries prevailed in England, of obtaining the opinion of the King's Bench on any question of law arising in the course of his proceedings, upon which he entertained a doubt.

The jurisdiction which we are here asked to exercise is essentially a Common Law one. Its foundation is shown by the opinion of Earl Cairns, when Lord Chancellor, in *The Over-*

(1) L. R. 10 Q. B. 587.
(2) [1902] 2 K. B. 1.
(3) [1891] 2 Q. B. at p. 592.
(4) 7 B. & C. at p. 331.
(5) 7 E. & B. 453.

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seers of the Poor of Wallsall v. *The London and North-Western Railway Co.* (1). The proceeding is not by way of appeal. An appeal must be authorized by statute, and there is no statute which gives an appeal from the decision of the Quarter Sessions in such a case as the present. But the Common Law requires that the Quarter Sessions Court shall, as must every other inferior Court, keep within its jurisdiction. The application of this principle provides a mode by which the Court of Quarter Sessions can, and, I respectfully say, ought to leave open for the consideration of this Court any question of law which appears to it to be doubtful.

To use the words of Lord Cairns—

> "All that was necessary was that the Court of Quarter Sessions in making its order should not make it an unspeaking or unintelligible order, but should in some way state upon the face of the order the elements which had led to the decision of the Court of Quarter Sessions. If the Court of Quarter Sessions stated upon the face of the order, by way of recital, that the facts were so-and-so, and the grounds of its decision were such as were so stated, then the order became, upon the face of it, a speaking order; and if that which was stated on the face of the order, in the opinion of any party, was not such *as to warrant the order*, then that party might go to the Queen's Bench, and point to the order as one which told its own story, and ask the Court of Queen's Bench to remove it by *certiorari*, and, when so removed, to pass judgment upon it, whether it should or should not be quashed."

He adds, however, this, which is material on one of the questions here:—

> "In that case, as I said just now, the jurisdiction of the Court of Queen's Bench was merely a jurisdiction to leave the order standing or to remove it out of the way. It was not a jurisdiction to substitute for it another or a different order; that would be making the Court of Queen's Bench, in the ordinary sense of the term, a court of re-hearing or of appeal."

To the same effect is Lord Penzance (p. 43):—

> "The cases are numerous to show that the Court of Queen's Bench was in the habit of dealing with and reviewing these orders of an inferior Court upon the face of them, and if upon the face of them they

(1) 4 A. C. 30.

were found insufficient, of quashing them. If they were not found insufficient, then they would not be quashed—that is to say, they would be affirmed. . . . Of course, until the Court of Quarter Sessions set out some facts upon the face of their orders, the Court of Queen's Bench could not interfere with them except upon matters of form; but whenever they did set out facts, and it is shown that, I may say, for centuries the practice was to set them out *whenever the Justices at Sessions had doubts*, the Court of Queen's Bench dealt with the facts as they appeared upon the face of the order, pronounced the order sufficient or insufficient, and quashed it if the Court saw reason to do so. . . . But, as was well pointed out by the learned counsel for the appellants, the *certiorari* itself bringing up the proceedings, independently of the order subsequently made upon it, put an end to all further jurisdiction in the Court of Quarter Sessions to deal with the matter. Therefore the Judges of the Queen's Bench then had the proceeding before them, and could either quash it or let it stand; but the magistrates in Quarter Sessions were then *functi officio*: they could no longer deal with the matter, either by way of affirming or of quashing the order."

From this discussion it appears to be quite clear that were this an order of conviction, we should have had jurisdiction to determine whether the matter stated on its face, according to law, justified its making.

The first question, then, is—Is there, in the exercise of this jurisdiction, any distinction between an order purporting to convict and one purporting to acquit? Does the application of this doctrine touch upon the well-established doctrine, that one who has once been acquitted by an authorised tribunal cannot be tried again?

I am of opinion that it does not, because to apply this doctrine there must be *an* acquittal; and if this order, which purports to acquit, be one which, upon its face, appears to have been made without jurisdiction, and therefore, upon its face, is null and void, there has *not* been in law *an* acquittal. This brings me to the question whether the order of the learned Chairman was right.

As to this, I desire, in the first instance, to refer to a matter which was not mentioned in argument, but the consideration of which is essential before the order in question here can be quashed, viz. whether a corporation is a "person" within the meaning of

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sect. 80 of 5 & 6 Vict. c. 106. It is right then that the parties, and the profession, should know that, although that question was not argued at the Bar, it has not been overlooked by the Court, that we have carefully considered it, and that we are unanimous upon it, although we differ upon another of the questions in the case.

The 13 & 14 Vict. c. 88, section 2 (1), enacts, that in the construction of the 5 & 6 Vict. c. 106, unless there be something in the subject of the context repugnant to such construction, "person" shall mean, and include, any body corporate, aggregate, or sole, as well as any individual, and also any company or partnership; and, by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 2 (1), in the construction of every enactment relating to an offence punishable on summary conviction (although passed prior to that Act), "person" shall, unless the contrary intention appears, include a body corporate.

In determining this question, although the Act, as a whole, cannot be disregarded, the ultimate decision must be on the particular section itself. Of the various sections of the Act, there are many in which a contrary intention does appear, such as those which constitute offences of which intent is a material part. I, therefore, restrict my consideration to section 80 alone.

It is one (which I shall consider more in detail later on) which imposes a penalty upon any "*person*" who causes any liquid or matter deleterious or poisonous to fish to flow into any river. Intent to render the water poisonous or deleterious is not part of the offence. It is a prohibition in the most general and absolute form against the doing of an act which is capable of being done either by a natural person or by a body corporate. The mischief to be remedied is the injury to the fish in the river. That mischief can result from the acts of either of these classes of persons. The remedy to be complete must be against both. The words used are capable of being so read as to make it complete. Are we to read them in this sense?

The law on this subject has been so settled, by modern cases, that it is unnecessary to refer to any of them in detail. Its general principles were stated by the House of Lords in *The Pharmaceutical Society* v. *The London & Provincial Supply Association*,

Limited (1); and instances of their application are to be found in many cases, of which *Hirst* v. *West Riding Union Banking Co.* (2), *Pearks and another* v. *Ward* (3), and *O'Duffy* v. *Jaffe* (4) are examples.

The first principle relates to the object of the enactment; the second to the character of the act which, by the extended construction, is sought to be attributed to a body corporate. The first is thus expounded by Lord Blackburn (5 A. C. 869–870):—

> "I am quite clear about this, that whenever you can see that the object of the Act requires that the word 'person' shall have the more extended or the less extended sense, then, whichever sense it requires, you should apply the word in that sense, and construe the Act accordingly."

Of course this principle is applicable only when the words are capable of being used in the extended sense. Therefore, if the special description in the statute of the person within it is one which cannot be answered by a body corporate, or if the act, contemplated or prohibited, be one which a body corporate is incapable of committing, then the limited construction must prevail. *The Pharmaceutical Company's Case* (1) and that of *O'Duffy* v. *Jaffe* (4) are instances of the first class of limitation. Offences in which either intent or *mens rea* is an essential ingredient are illustrations of the other. As to these limitations, some observations of Channell, J., in *Pearks and another* v. *Ward* (3), which point to the solution of the question by the law applicable to the liability of a master for the act of a servant, are valuable.

In connexion with this, I may observe, that the observations of Bramwell, L.J., in *The Pharmaceutical Society* v. *The London Supply Association* (5), that "offences—certainly offences of commission—are the offences of individuals, not of corporations," and that were a statute "to say that any 'person' publishing a libel should be guilty of an offence . . . a corporate printing company publishing a libel would not be guilty in its corporate

(1) 5 A. C. 857.
(2) [1901] 2 K. B. 560.
(3) [1902] 2 K. B. 1.
(4) [1904] 2 I. R. 27.
(5) 5 Q. B. D. at p. 313.

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capacity," are dissented from by Lord Blackburn, in his opinion, in the appeal in the same case, in unusually strong language—

> "And, therefore, I must totally dissent, notwithstanding what Lord Justice Bramwell said, or is reported to have said, upon the supposition that a body corporate . . . that incorporated itself for the purpose of publishing a newspaper, could not be tried and fined, . . . or that a corporation which commits a nuisance could not be convicted of the nuisance or the like. I must really say that I do not feel the slightest doubt upon that part of the case" (1).

Those I take to be the broad general principles; and, applying them here, I cannot help holding that the joint effect of the object of the section, and of the absolute prohibition to which I have already referred, is, to require that "person" should be read in the more extended sense. I admit that other provisions bearing upon the section in question, or on proceedings under it, cannot be wholly disregarded, and that sect. 99, which prescribes that a recognizance (which, notwithstanding what was said by the Court in *Cortis* v. *The Kent Waterworks Co.* (2), possibly cannot be entered into by a body corporate) shall be entered into by an appellant as a condition precedent to an appeal, cannot be wholly omitted from consideration. But this section deals with procedure only, and the subject of sect. 80 is matter of substance, and if one has to yield to the other, "form" must, in my opinion, succumb to "substance." A married woman cannot enter into a recognizance; yet it could not be contended that she could not be guilty of the offence. It follows either that the provision as to recognizances is not applicable to an appeal by a body corporate, or that the provision is, in relation to such a person, capable of modification. In preference I adopt the former alternative, on the principle that *lex non cogit impossibilia.* Consequently, I hold that "person" in sect. 80 includes a body corporate, but that the proviso in sect. 99 is necessarily restricted to "parties appealing" who are capable of entering into a recognizance, and therefore excludes a body corporate.

This brings me to the construction of section 80. The *corpus delicti* constituted by it is an act "simpliciter." We

(1) 5 A. C. 870, 871. (2) 7 B. & C. 331.

have not to consider its effects or the intent with which it was committed. Within the description of the acts which by it are constituted a crime, is causing . . . deleterious . . . liquid . . . to flow into a river.

The case finds that the defendants raised certain sluices, . . . and scoured out the settling-pond (which has been treated during the argument, and which I consequently treat as "adjoining" the river, although I agree with Madden, J., that it is part of the river) "and swept all the deposit" into the river. The matter when leaving the settling-pond (and, therefore, when entering the river) "was highly deleterious to fish by depriving the water of its necessary oxygen, and so rendering it unable to sustain fish-life, and the discharge would render deleterious to fish-life a volume of water at least 100 times its size." So far, in my opinion, we have the offence found, "but," proceeds the case, "having regard to the heavy fresh in the river, and the large volume of water therein, the discharge at the moment of getting into the river *became so largely diluted* as to cease to be deleterious to fish."

In my opinion, the time at which the deleterious character of the matter is to be ascertained is the moment it enters the river. The effect of the action upon it of the water of the river, which necessarily must be *after* it has entered it, is in my view absolutely immaterial.

Were any words required to emphasize that which, in my opinion, is clear from the words constituting the offence, they would be found in the proviso, which protects from penalties matters which are described in words of the present tense, pointing to a time which cannot be taken to be other than the moment at which they enter the river.

That which is constituted the offence is action which causes certain matter to enter a river; the character of the matter at any time subsequent to its entry is immaterial. The question is not the effect of the matter on the water, or of the water on the matter. The object of the Legislature appears to me to have been to exclude these effects from the consideration of the tribunal. The case is not one to which the principle of *de minimis* applies. The question is one of construction of the statute—whether, on

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its true construction, the action of the water in the river on the deleterious matter is a relevant consideration.

The case has been argued as if the deleterious substance were not lime, although the deposit contained a salt of lime, and I so treat it; but had it been lime, and that the summons contained the proper charge, it could not have been argued that the dilution of the lime in the river to such an extent as to deprive it of its deleterious character was a defence; but the deleterious character of the substance, whether it be lime or not, must be determined in the one case at the same moment as it would be in the other, in each case at the moment of its contact with the river.

For these reasons I am of opinion that the findings of fact of the Quarter Sessions amount to a finding of guilt, and, to use the words of Lord Cairns already referred to, are not such as to warrant the order made.

Being of this opinion, it remains only to determine what order we should make. We must, of course, quash the so-called acquittal. In so doing we do not trench upon any constitutional doctrine. As the legal conclusion of innocence does not follow from the facts stated, the order is, in law, null and void on its face. The order to quash will do no more than declare that it is that which, on its face, it appears to be, viz. null; and remove from the Rolls of the Quarter Sessions Court the entry of that which is null and of no effect. The important question, however, is, Can the order go further?

The case states that if the question put be, as I think it should be, answered in the negative, "the Court will be pleased to remit the case to the Court of Quarter Sessions to proceed therein according to law, with such directions as may be considered necessary."

Can we do this? We do it every day when hearing cases stated by Justices; but in those cases we do so under a statutable jurisdiction, which expressly invests the Court with that power.

It is done every day by the Court of Appeal in the exercise of its appellate jurisdiction; but there is no appeal from the Quarter Sessions. It is done every day in England in the exercise of the jurisdiction of the King's Bench there, which is identical with ours, subject only to one distinction, that arising out of a recent statute. The Supreme Court of Judicature Act, 1894, by sect. 2,

confers jurisdiction upon the High Court, in such a case as the present, to remit it to Quarter Sessions, with the opinion or direction of the King's Bench, for re-hearing and determination. That most beneficial legislation, which saves a large amount of expense, although applicable to the richer country, England, does not as yet apply to the poorer country, Ireland.

It is not for me to ask why this is so. It is sufficient that it is so. With us the jurisdiction unimproved by the legislation of 1894 stands in the exact position in which it did here and in England in 1878, and in centuries previously, when, according to the decision of the House of Lords, the jurisdiction is limited to quashing, or by refusing to quash, in fact to affirm, the order below. The reason given by Lord Penzance is conclusive. It is, that as the proceedings have been removed by the *certiorari*, the magistrates became, on the moment it issued, *functi officio*. They had exercised their jurisdiction, exercised it wrongly, it is at an end. There is no instance in the books, in a case such as the present (in which the Quarter Sessions determined *on the merits*), of the proceedings being remitted. The practice in England previous to the Act of 1894, so fully stated in the memorandum which the Lord Chief Justice of England has been good enough to furnish, is conclusive upon this.

We must therefore content ourselves with quashing the order and refusing to remit the case to Quarter Sessions.

LORD O'BRIEN, L.C.J.:—

I have very little to add. I entirely agree with the judgment of the Lord Chief Baron and that of my brother Gibson as to the construction of the 80th section of the 5 & 6 Vict. c. 106. Perhaps I owe an apology for the too great insistence with which I pressed during both arguments the view that now prevails. But this case, originally small, has developed into one of some importance. It has established that an incorporated company can be prosecuted under this Act of Parliament; and it has also established that the Court of Quarter Sessions has power to state a case for the opinion of the Court—a very important matter indeed.

I desire to express my obligation to the Lord Chief Justice of

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England, Lord Alverstone, for his most valuable memorandum. All the members of the Court are of opinion that we should place that memorandum on the records of the Court, and have it printed in our reports.

The dismiss must be quashed.

Solicitor for the complainant: *J. K. Currie.*

Solicitors for the defendants: *L'Estrange & Brett.*

J. L.

O'SULLIVAN *v.* THE GUARDIANS OF THE DONEGAL UNION (1).

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Nov. 24, 28. 1906. Feb. 14, 15, 27.

Local Government—Poor Law—Vaccination—Re-vaccination—Operations performed elsewhere than at dispensary districts or vaccination stations—Right of medical officer to fees—Report prescribed by Local Government Board Rules of 1899—21 *&* 22 *Vict. c.* 64, *ss.* 1, 3—42 *&* 43 *Vict. c.* 70, *s.* 6.

The medical officer of a dispensary district is under no obligation to vaccinate or to re-vaccinate persons elsewhere than at the dispensary, or at the vaccination stations (if any) appointed under the provisions of 21 & 22 Vict. c. 64, and he cannot recover fees from the guardians of the union for vaccination or re-vaccination performed elsewhere, although within his district:—

So *held*, by Lord O'Brien, L.C.J., and Andrews and Wright, JJ.; Boyd, J., *diss.*

Held, also, by Lord O'Brien, L.C.J., and Andrews and Wright, JJ., Boyd, J., *diss.*, that the form of report (Form H) prescribed by the General Rules of 24th February, 1899, for the Government of Dispensary Districts is not *ultra vires*, and the making of a report in such form is a condition precedent to the right of the medical officer to recover fees from the guardians for vaccination or re-vaccination.

CASE STATED by Gibson, J., on the hearing of a civil bill, as follows:—

1. This was an appeal, heard at Lifford Summer Assizes, 1905, from a decree of the County Court Judge, in an action for vaccination fees. The defendants paid into Court £12 8*s.* for which liability was admitted, that is fees at two shillings each for 124 cases.

2. The facts were as follows: The plaintiff, a medical doctor, has been for the past six years medical officer of the Mountcharles dispensary district, situate in the defendants' union. During the half year from April 1st, 1904, to September, 1904, he vaccinated successfully in ninety-five cases, the fees for which amounted to £9 10*s.* He re-vaccinated in sixty-three cases, the

(1) Before LORD O'BRIEN, L.C.J., and ANDREWS, BOYD, and WRIGHT, JJ.

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fees for which amounted to £6 6*s*. Of the above, 124 represent cases treated at the dispensary, and 34 were cases treated at patient's residence or elsewhere. No vaccination stations outside the dispensary were established as prescribed. In vaccinating or re-vaccinating outside the dispensary the plaintiff acted *bonâ fide* and reasonably. The plaintiff furnished the defendants, on September 7th, 1904, with a report on Form H, stating his operations. This form was supplied by the defendants. It had been supplied by the defendants and filled in by the plaintiff in the same way since his appointment, and his fees had been previously paid without question. The form so supplied and used did not purport to restrict the officer's fees to dispensary cases, and differed from the form prescribed by the Local Government Board Regulations, 1899, which it is alleged had that effect.

3. After the plaintiff had transmitted his report a circular was received from the Local Government Board calling attention to the form, and stating that fees could not be allowed for cases outside a dispensary or vaccination station. It was not proved, nor did the defendants know, how many of the thirty-four reported cases outside the dispensary were for original vaccination, and how many for re-vaccination.

4. The controversy relates to the thirty-four cases outside the dispensary, and depends on the effect of the statutes 21 & 22 Vict. c. 64, and 42 & 43 Vict. c. 70, and the official regulations of the Local Government Board, 1899, and form thereby prescribed. The regulations were duly published, and if not *ultra vires* are binding. The defendants contend that the prescribed form of report is a condition precedent to the right to recover fees for vaccination and re-vaccination alike, and that the language precludes the plaintiff from recovering for cases outside the dispensary. The plaintiff argues that on the facts he is entitled to recover; he disputes the construction and effect of the form, which in any event he urges does not apply to re-vaccination cases.

5. The civil-bill decree, report of the plaintiff, Local Government Board Regulations, and Form, are to be read as part of this case.

As the point appeared one of difficulty and importance, I assented to the request of plaintiff's counsel to state a case.

The questions for the decision of the Court are:—

1. Is the use of the prescribed form a condition precedent to a medical officer's right to recover fees (*a*) for vaccination, (*b*) for re-vaccination?

2. Has the prescribed form the effect of restricting a medical officer's right to recover fees to cases treated at the dispensary and prescribed vaccination stations (*a*) in vaccination cases, (*b*) in re-vaccination cases?

3. Are defendants concluded by conduct from relying on the want of the prescribed form?

4. Upon the facts, are the defendants liable for the cases outside the dispensary or any of them?

The Form H, referred to in the second paragraph of the case as having been supplied by the defendants and filled in by the plaintiff, is the form given in Mooney's Compendium of Poor Law, p. 475, certifying that the medical officer has between the dates therein mentioned vaccinated persons, all of whom are resident in dispensary district; that he has duly inspected them at the times required by regulations of the Local Government Board, and has entered all the required particulars in the vaccination register (Form G).

Form H, as now prescribed by the Local Government Regulations of 1899, is as follows:—

FORM OF REPORT OF THE MEDICAL OFFICER, IN PURSUANCE OF SECTION 3 OF THE ACT 21 & 22 VICT. C. 64, OF THE NUMBER OF PERSONS SUCCESSFULLY VACCINATED BY HIM.

Union. *Dispensary District.*

I hereby certify that I have, between the dates and , successfully Vaccinated, at the Dispensary and Vaccination Stations, persons; that I have in each case performed the operation in the manner prescribed by the Local Government Board, and that I duly inspected the result of the Vaccination at the times required by the regulations of the Local Government Board, and that I have entered all the required particulars in the Vaccination Register.

(Signature,) ,
Medical Officer of *Dispensary District.*

Date,

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Gaussen (with him *Matheson, K.C.*, and *Wylie, K.C.*), for the plaintiff.

Henry, K.C., and *M'Loone*, for the defendants.

[The following statutes, rules, forms, and authorities were referred to:—3 & 4 Vict. c. 29, s. 1; 4 & 5 Vict. c. 32; 14 & 15 Vict. c. 68, ss. 12 and 13; 21 & 22 Vict. c. 64, ss. 1 and 3; 26 & 27 Vict. c. 52, preamble, and ss. 5, 7, and 8; 42 & 43 Vict. c. 70, ss. 3, 4, 6, 7, and 12; General Rules of 24th February, 1899, made by Local Government Board for Ireland for the Government of Dispensary Districts, Articles 10 and 15, Forms G, H, L, N and O; *Duncan* v. *Guardians of Omagh Union* (1); *Flood* v. *Guardians of Ballyshannon Union* (2); Maxwell on Statutes, 3rd ed., pp. 554 and 556.]

1906. Feb. 27.

WRIGHT, J.:—

The Poor Relief (Ireland) Act, 1851, 14 & 15 Vict. c. 68, by section 13, imposed on the medical officer of a dispensary district the duty of vaccinating all persons coming to him for the purpose. Section 1 of the Act of 1858, 21 & 22 Vict. c. 64, declares in fuller and more comprehensive language his duty and obligation to be to vaccinate all persons resident in his district who may come to him for that purpose, or whom he may be requested to vaccinate, subject to regulations to be issued by the Commissioners (now the Local Government Board). These words "whom he may be requested to vaccinate" seem to me to mean a request coming from the father or mother or other person having the care, nurture, or custody of a child, and may possibly include others. The same section further directs that the Committee of Management of every dispensary district in Ireland shall divide such dispensary district into so many vaccination districts as they may deem advisable and necessary, and shall require the medical officer to attend at some convenient place within each such vaccination district to be approved of by the Committee, at such times as the Committee may fix or approve; and then follow the words, to which I have

(1) 8 L. R. Ir. 239. (2) 4 New Ir. Jur. R. 191

already referred, imposing on the medical officer the duty of vaccinating all persons resident in his district who *may come to him* for that purpose, etc. The clear meaning of the section I take to be that persons wishing to be vaccinated by the medical officer at the expense of the ratepayers are to attend at the place, whether dispensary or vaccination station, fixed and approved of by the Committee of Management.

The Act of 1863, 26 & 27 Vict. c. 52, for the first time rendered vaccination compulsory in Ireland, and by the 8th section the Registrar of Births and Deaths in every district was directed, after the birth of a child had been registered, to give notice to the parent, or person having the care, nurture, or custody of the child, to have the child vaccinated, and was required with the notice to deliver to such person (*i.e.* parent or other person) a notice of the days, hours, and places within the district at which the medical officer would attend for the purpose of vaccination. The Vaccination Amendment (Ireland) Act, 1879 (42 & 43 Vict. c. 70), by section 3, enacted that the parent or other person having the care, nurture, or custody of a child should, within three months after the birth of the child, "take or cause to be taken the said child to the medical officer of the dispensary district" to be vaccinated; and so as to ensure that the operation had been successful, provision was made by section 4 that, on the day week following, the parent, &c., should take the child to the same medical officer, so that he might ascertain by inspection the result of the operation.

These several statutes would appear to me clearly to indicate that vaccination at the cost of the union was to be performed at the dispensary or other prescribed place, *e.g.* vaccination station, and that the person to be vaccinated must attend there, or be brought there. There is no duty in any of the Vaccination Acts imposed on the medical officer to attend elsewhere, at, for instance, the residence of any person within the dispensary district who requires to be vaccinated; the medical officer cannot, as I read the several Vaccination Acts, be called on or required to perform the operation of vaccination elsewhere than at the appointed places, and if he does so, that is a matter between him and his patient, but one for which the ratepayers cannot be called upon to pay.

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The Act of 1879, 42 & 43 Vict. c. 70, by its 6th section for the first time provided for cases of re-vaccination, and the somewhat curious language of the section has already been the subject of a decision of this Court in the case of *Duncan* v. *The Omagh Union* (1). The proviso at the end of the section refers to the report which is required to be made by the medical officer under section 3 of the 21 & 22 Vict. c. 64, already referred to. That section directs him to make a report to the Committee of Management, from time to time, of the number of persons successfully vaccinated by him in each year under the provisions of that Act; the report to be in such form and to contain such further particulars as the Commissioners (now the Local Government Board) shall direct, and to be transmitted by the Committee to the Board of Guardians, and recorded by them on their minutes.

The general power of the Commissioners (now the Local Government Board) to frame rules and regulations will be found in section 12 of the 14 & 15 Vict. c. 68, and by it they are empowered to make general rules and regulations for the government of each dispensary district, and for the guidance and control of the guardians, the Committees of Management, and the several officers to be appointed in connexion therewith; and they are further empowered to alter or revoke such rules and regulations, and make such new rules and regulations from time to time, as they may think fit. In pursuance of these very extensive powers, rules and regulations have been made, and from time to time have been altered.

I have no doubt, as already stated, that the intention to be gathered from the several Vaccination Acts was that vaccination at the expense of the ratepayers was to be performed at the appointed places, dispensary or vaccination stations, and not elsewhere; and when re-vaccination was dealt with by the Act of 1879, I see no reason why the same principle should not apply.

This principle that the ratepayers are only to be responsible for fees for vaccination performed at the appointed places is recognized by the form of report, issued by the Local Government Board in 1899, to be made by the medical officer to the Committee

(1) 8 L. R. Ir. 239.

of Management under section 3 of the 21 & 22 Vict. c. 64. It is Form H, and runs as follows: "I hereby certify that I have between the dates and successfully vaccinated at the dispensary and vaccination stations persons," &c. This form is silent as to the number of persons re-vaccinated; but while I think that the form might be improved by adding to it a statement of the number of persons re-vaccinated, there is, I am clearly of opinion, nothing wrong or *ultra vires* in the present form, and provided the medical officer makes the report in the prescribed form, he is in a position to claim the fees, not merely for cases of successful vaccination, but also of re-vaccination.

Accordingly I am of opinion that the use of the prescribed form of report is a condition precedent to a medical officer's right to recover fees (*a*) for vaccination, and (*b*) for re-vaccination, and that the prescribed form of report, rightly and in accordance with the several Vaccination Acts, limits the medical officer's right to recover fees from the Union, both in vaccination and re-vaccination cases, to operations performed at the dispensary and vaccination stations.

BOYD, J.:—

In this case, which has been submitted to us for determination by Mr. Justice Gibson, the point for our consideration is the right of the plaintiff, as the Medical Officer for the Mountcharles Dispensary District, to be paid his fees for vaccinations and re-vaccinations irrespective of the fact that some of these operations were performed by him outside the precincts of the dispensary, but within his district. No vaccination stations outside the dispensary were established as prescribed. It has been found by the learned Judge that in vaccinating or re-vaccinating outside the dispensary the plaintiff acted *bonâ fide* and reasonably.

The plaintiff furnished to the defendants on September 7th, 1904, a report on Form H, stating his operations. This form was supplied by the defendants, and filled in by the plaintiff, in the same way since his appointment six years previously, and his fees had been always paid without question. The form so supplied and used did not purport to restrict the officer's fees to dispensary cases, and differed from the form prescribed by the Local Govern-

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ment Board Regulations, 1899, which, it is alleged, had that effect.

The first statute relating to vaccination is 3 & 4 Vict. c. 29, and sect. 1 required the Guardians to contract with the medical officer for vaccination cases. 4 & 5 Vict. c. 32 provided for the payment of the expenses of vaccination out of the rates. By 14 & 15 Vict. c. 68, sect. 13, the medical officer was required to vaccinate *all* persons who should come to him for relief.

21 & 22 Vict. c. 64, sect. 1, enacts that the dispensary committee shall, subject to the approbation of the Commissioners (now represented by the Local Government Board), divide the dispensary district into so many vaccination districts as they may deem advisable and necessary, and shall report such districts to the Commissioners for their approval, and shall require the medical officer of the district to attend at some convenient place within such vaccination district to be approved of by the committee, at such times as the committee may fix or approve; and the medical officer is required to vaccinate all persons resident in his district who may come to him for the purpose, or whom he may be requested to vaccinate, subject to such regulations as should be issued by the Commissioners in that behalf.

It is to be observed that he is required to vaccinate all persons who may come to him, or whom he may be requested to vaccinate. This requires the medical officer to vaccinate persons attending at the appointed places, and others elsewhere upon request. It is not stated by whom the request is to be made. By the previous Act he is obliged to vaccinate *all* persons who might come to him anywhere. The latter statute fixes a place where he must attend at convenient times for the purpose. No doubt this was fixed for the mutual convenience of both the patients and the medical officer; but there is no provision releasing him from his obligation under the previous statute to vaccinate *all* persons who should come to him anywhere.

By sect. 3 of the latter Act the medical officer is bound to make a report to the committee, from time to time, of the number of persons successfully vaccinated by him in each year, under the provisions of the Act. This section does not require him to specify where the vaccinations have been made. It is also

provided that the report shall be in such form, and give such further particulars, as the Commissioners shall direct; but it does not give the Commissioners power to deprive him of his fees for vaccinations effected elsewhere than in the appointed places.

By 26 & 27 Vict. c. 52, vaccination was made compulsory, and it was provided that the medical officer should be paid 1*s.* for each successful vaccination in his district. It does not limit such payment to persons vaccinated in the appointed places, and the certificate to be given for the successful vaccination, according to the form in the Act, does not prescribe the place of such vaccination, and does not limit it to vaccination at the dispensary. Nor does the statute, by sect. 8, require the notice thereby directed to state that he shall attend only at the dispensary for the purpose of vaccination, but requires the medical officer by a notice to state the days, hours, and places within the district at which he will attend for the purpose.

The last statute applicable to vaccination is 42 & 43 Vict. c. 70. This statute applies also to re-vaccination, and it provides by sect. 6 that a fee of 2*s.* shall be paid by the Board of Guardians to the medical officer for every person successfully vaccinated, or every person re-vaccinated, provided he shall have made the report regarding the persons so successfully vaccinated. No report is required as to re-vaccination, but the medical officer is by statute entitled to be paid the prescribed fee. The prescribed form does not provide for a report in respect of cases of re-vaccination. The medical officer is, however, bound to enter in the register of vaccination, which he is required to keep in pursuance of the 7th section of 26 & 27 Vict. c. 52, all cases of vaccination performed by him.

Before considering the forms in use, I shall refer to what was the object of all these Vaccination Acts. It was to prevent, as far as lay in the power of the authorities, the spread of the dire disease of small-pox throughout the country. Statutes were passed, from time to time, for the purpose of providing that vaccination should be attended to by all the medical officers of the various dispensary districts throughout the country. I presume it was found by experience that the provisions thus made were

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not availed of by the public, and, therefore, the Legislature passed the statute 26 & 27 Vict. c. 52, making it compulsory on parents and certain other persons to bring children to the dispensaries for vaccination. The first statutes passed provided for vaccination by the medical officer, and certainly such vaccination was not required to be at any particular place. I can understand what a burden was thus cast on the medical officer, who might, as was thrown out during the argument, have to travel all over the country to attend to such cases. An Act was then passed providing for the fixing of a prescribed place where the medical officer should attend, and I think that the object was that he should compulsorily attend there, and be available on certain days and hours. That, and nothing else, was, I think, the object. It did not take away his right to fees for operations performed elsewhere; it merely fixed a place at which he was bound to attend; it did not forbid the exercise of his professional services elsewhere than in such place.

The Local Government Board have at different times framed two forms of report. The first, which was in existence down to the year 1899, was unobjectionable. In that year a new form of report was framed, and has been acted upon in a manner which shows that the authorities are determined the medical officer shall not get his legitimate fees for any services rendered by him, though at greater inconvenience to himself, outside the dispensary; for they have struck out his claim in this case in respect of thirty-four cases where the vaccination had not taken place at the dispensary. By what authority did they do this? The statute says the medical officer is to be paid 2*s.* for every person successfully vaccinated and re-vaccinated, and what right have they to say he is not to be paid for these persons on whom he was bound to perform the operation? I think the rule that deprives the plaintiff of this right is *ultra vires*. The form of report which the Local Government Board is authorised to prescribe must be a form not in violation of, but in pursuance of, the statute.

I wish to point out an omission made in these forms of 1899, with reference to re-vaccination. Form G prescribes the form of register of cases of successful vaccination and re-vaccination, and provides columns for the entering of the names not only of per-

sons successfully vaccinated, but of persons successfully re-vaccinated; while there is not a word about re-vaccination in Form H, which prescribes the form of report, and under which it is held that there is a disability in the plaintiff to recover the fees earned by him honestly and *bonâ fide*.

Then coming to Form L, the "Medical Officer's Return," the headings of the 5th and 6th columns prescribe a return of the "No. of persons vaccinated during the above period by you as Dispensary Medical Officer," and "No. of persons re-vaccinated." It does not say "at the dispensary."

With reference to the words in section 1 of 21 & 22 Vict. c. 64, "whom he may be requested to vaccinate," it is not stated in the statute by whom the request is to be made. It must, I think, be assumed that under circumstances the request can be made by anyone. In case there should be great inconvenience in the person attending the dispensary, or that this was impossible, I think the request could be made by the person requiring the services of the medical officer for himself or for his child. It is far better for the doctor to have persons bringing their children to him at the dispensary, but, nevertheless, if called on, he is bound to exercise his skill elsewhere, and it is rather hard if he is not to be paid his statutory fee in such case.

No ticket is required to be obtained or produced in cases of vaccination (see Form N); but in cases of ordinary illness a ticket is necessary to be obtained both for attendance at the dispensary (Form E 1) or at the patient's house (Form E 2).

In my opinion, the questions should be answered as follows:— 1. (*a*) Yes, if the form, as settled, was not *ultra vires*, but the form, as settled, is *ultra vires*, and not binding: (*b*) for re-vaccination there is no prescribed form. 2. (*a*). No; (*b*) No. 4. Yes.

ANDREWS, J.:—

The defendants' liability to the plaintiff for the thirty-four cases (or it may be, having regard to his report of the 7th of September, 1904, the thirty-seven cases) treated by him outside the dispensary, depends upon the construction and effect of the enactments I shall refer to, and the General Rules and forms issued on the 24th of February, 1899, made and prescribed by the

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Local Government Board for Ireland, and approved of by the then Lord Lieutenant.

The Act 21 & 22 Vict. c. 64 (hereinafter referred to as the Act of 1858), by its 1st section, after directing the Committee of Management of each dispensary district (whose business has been transferred to the guardians by the Local Government (Ireland) Act, 1898) to divide the district into as many vaccination districts as they may deem advisable and necessary, proceeds to direct them to require the medical officer of such district to attend at some convenient place within each such vaccination district, and he is thereby required to vaccinate all persons resident in his district *who may come to him* for that purpose, or *whom he may be requested to vaccinate*, being fit subjects for vaccination, subject to such regulations as may be issued by the Poor Law Commissioners (now the Local Government Board) in that behalf. The Act of 14 & 15 Vict. c. 68, referred to in the preamble of the Act of 1858, provided by section 13 that the medical officer should vaccinate all persons who *might come to him* for that purpose, subject to such regulations as might be issued by the Commissioners in that behalf. The 3rd section of the Act of 1858 required the medical officer to make a report from time to time to the committee of management of the number of persons successfully vaccinated by him in each year, and provided that the report should be made in such form, and should contain such further particulars, as the Commissioners should direct. Article 15 of the General Rules of 1899 specified the duties of the medical officer, and by clause 9 required him to vaccinate all persons *who might come to him at the dispensary*, and to *attend at such convenient places* within each vaccination district formed by the guardians, at the times fixed and approved by them, for the purpose of vaccinating all persons *who might come to him*, or *whom he might be requested to vaccinate*, being fit subjects for vaccination. Clause 10 provided that the report which the medical officer was required by the Act of 1858 to make should be made in the form H annexed to the Rules. This form introduced a variation into the form of report (also called Form H) which appears to have been in use prior to the Rules of 1899. The old form only required the medical officer to report the number of persons he had within a specified time successfully

vaccinated, who were at the time resident in his dispensary district. The new form required him to report the number of persons he had within a specified time successfully vaccinated *at the dispensary and vaccination stations*. The 6th section of the 42 & 43 Vict. c. 70 (hereinafter referred to as the Act of 1879) repealed the previous scale of the medical officer's vaccination allowance, and increased it by directing the Board of Guardians to pay the medical officer for every person successfully vaccinated, or every person re-vaccinated by him, within his dispensary district, after the passing of that Act, the sum of 2*s*., "provided that the said medical officer shall have made the report to the committee of management" (now the guardians) "which is required by the Act" of 1858. Re-vaccination is mentioned for the first time in the Act of 1879, and it was decided in the year 1881 in the case of *Duncan* v. *The Guardians of the Omagh Union* (1), that the medical officer was entitled to the fee of 2*s*. for each re-vaccination, whether successful or not.

Upon the true construction and effect of the enactments I have referred to, and of Rule 15, clauses 9 and 10, and the amended Form H, I am of opinion that the medical officer in the present case is not entitled to be paid by the guardians for the thirty-four, or thirty-seven, cases treated by him outside the dispensary.

It does not appear why the dispensary district of the Donegal Union has not been divided into vaccination districts pursuant to the 1st section of the Act of 1858. The question whether it ought to be so divided is not before us, but at present the only place at which the medical officer is required to vaccinate is at the dispensary (Rule 15, clause 9). The 1st section of the Act of 1858, as I have stated, requires the medical officer to vaccinate all persons resident in his district "*who may come to him for that purpose.*" Having regard to the provision in that section for constituting vaccination districts, and the obligation of the medical officer to attend at some convenient place to be approved of, these words, in my opinion, mean, who may come to him at an approved place. The words which follow, viz., "*or whom he may be requested to*

(1) 8 L. R. Ir. 239.

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vaccinate" also, in my opinion, mean, whom he may be requested to vaccinate *at that place*. I think these words refer to the cases of children brought by their parents or custodians for vaccination, but they may include other persons. These duties are to be performed by the medical officer subject to such regulations as may be issued by the Commissioners, and the 3rd section requires the medical officer to make a report in such form with such particulars as the Commissioners shall direct. I see no reason for regarding the amended Form H, or the rules of 1899 relating to this subject, as *ultra vires*, and this form deals with vaccination *at the dispensary and vaccination stations*. Form N, and the notice as to vaccination attached to it, are important, and appear to support the opinion I have formed. I think the old Form H was defective, and too general, having regard to the Act of 1858, and that the amended Form H is more in accordance with that Act. Why it omits cases of re-vaccination does not appear, but it does not purport to exclude payment for re-vaccination cases, and, having regard to the 6th section of the Act of 1879, it could not, in my opinion, do so. It may be by an oversight that the amended Form H does not include cases of re-vaccination, and I venture to think that it would have been a better form if it had done so. It is capable, however, of being revised. I observe that Form G for the Vaccination Register seems to have been prepared without reference to the case of *Duncan* v. *The Guardians of Omagh Union* (1), as the re-vaccination cases it seems limited to are cases of successful re-vaccination. There may, however, be some reason for this which I am not aware of. It would appear to me, however, that as the medical officer is entitled to be paid for re-vaccinations, whether successful or not, all cases of re-vaccination ought to be entered in the Register, otherwise there does not seem to be any provision for keeping a record of them, and as the Register is to be laid before the guardians from time to time (see note at foot of Form G), I think it should show all the cases which the medical officer is entitled to be paid for; but this does not arise in the present case.

It would be unfortunate for the medical officers if the words "or whom he may be requested to vaccinate" were held to impose

(1) 8 L. R. Ir. 239.

on them the obligation of going anywhere in their dispensary districts to which anyone might request them to go, and yet be entitled to two shillings only in each such case. They would, if that duty were imposed on them, not only be very insufficiently paid for the discharge of it, but their independent practice might be seriously interfered with, if not destroyed.

It will be remembered that the cases under consideration are cases of gratuitous vaccination and re-vaccination, so far as the persons treated are concerned. The medical officer is, of course, in no way precluded from vaccinating, or re-vaccinating, outside the dispensary or vaccination stations, and receiving payment from the persons treated; but fees for these cases cannot be paid out of the rates.

In the first question reserved by the case stated for the decision of the Court the words "the prescribed form" I understand to mean the amended Form H, and the answer to that question should, in my opinion, be in the affirmative, both as to cases of vaccination and re-vaccination, though the latter are not expressly included in the form.

The answer to the second question should, in my opinion, be, that the prescribed amended Form H, and the provisions of the Acts of 1858 and 1879, and the General Rules and Forms of 1899, restrict the medical officer's right to fees to cases, both of vaccination and re-vaccination, treated at the dispensary and prescribed vaccination stations (if any).

The answer to the third question should, in my opinion, be, that the defendants are not precluded by conduct from relying on the want of the prescribed amended Form H.

The suggested question of estoppel by continuing to issue the old Form H was not argued before us, and was abandoned.

The answer to the fourth question should, in my opinion, be, that, upon the facts as disclosed, the defendants are not liable for the cases treated by the plaintiff outside the dispensary, or any of them.

Under the circumstances, I think the parties respectively should abide their own costs of the case stated, and the arguments thereon.

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Lord O'Brien, L.C.J.:—

I agree in the result arrived at by my brothers Wright and Andrews. I may shortly add that, in my view, the extent of the plaintiff's obligation was the measure of his remuneration. The plaintiff's obligation, in my opinion, was to attend at the dispensary or at the vaccination stations, if such existed, and vaccinate or re-vaccinate such persons as came or were brought there; and the plaintiff was under no obligation to vaccinate or re-vaccinate any person at any place other than the dispensary or stations. It is said that the medical officer was to vaccinate all persons in his district "whom he may be requested to vaccinate." This plainly meant—requested by parents or persons *in loco parentis*, but at the dispensary or the vaccination stations. I put this case: suppose the dispensary was within one mile of the residence of a farmer, and that, say, a Monday was the day on which the doctor was to attend there, would it be argued that the doctor was, on that particular day, bound to go to the farmer living, say, on a mountain side, if he was requested by the farmer to go there? This would be most unreasonable. This, I think, shows that the expression "whom he may be requested" means when requested to do so at the dispensary station by parents or persons *in loco parentis*, or persons in an analogous position. Vaccination in broadcast fashion through the district generally might lead to a loose, uncheckable practice, and it was, amongst other objects, to check this loose and somewhat dangerous practice that vaccination and re-vaccination were confined to the dispensary or vaccination stations.

Solicitor for the plaintiff: *Lewis R. Lipsett.*
Solicitor for the defendants: *James Dunlevy.*

J. G. T.

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Solicitor for the plaintiff: *Lewis R. Lipsett.*
Solicitor for the defendants: *James Dunlevy.*

J. G. T.

THE KING (WRIGHT) *v.* CHAIRMAN AND JUSTICES OF COUNTY CORK (1).

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1906.
Jan. 18, 19, 24.

Licensing Law—Licensing (Ireland) Act, 1902 (2 *Edw.* 7, *c.* 18), *section* 3—"*Lease*"—"*Expiration*"—*Parol contract of tenancy from year to year determined by notice to quit.*

The determination by notice to quit of a contract of tenancy from year to year created by parol is an "expiration of a lease" within section 3 of the Licensing (Ireland) Act, 1902.

IN the year 1877, Denis O'Mahony became tenant of a house in Patrick-street, Clonakilty, under a contract of tenancy from year to year, which, for the purpose of the present report, is to be taken as having been created by parol (2). In the year 1879 he obtained a publican's retail seven-day license in respect of these premises. The interest of Denis O'Mahony in the premises subsequently became vested in Mrs. Ellen O'Mahony, his wife, who continued to carry on the business of a publican therein until the 10th April, 1905, when she was evicted as hereinafter mentioned. In September, 1903, the landlords of the premises served a notice to quit upon Mrs. O'Mahony. This was followed up by ejectment proceedings, and she was evicted from the premises on the 10th April, 1905. Having acquired other premises in Sovereign-street, Clonakilty, in the immediate vicinity of the premises from which she had been evicted, she, on the 20th October, 1905, applied under the provisions of section 3 of the Licensing (Ireland) Act, 1902, to the Justices at the annual Licensing Quarter Sessions for a certificate for a new seven-day

(1) Before PALLES, C.B., and JOHNSON and KENNY, JJ.

(2) It was alleged in the affidavits filed by way of cause against the conditional order that the tenancy had been created by an agreement in writing, which had been lost; but the Court was of opinion that there was no sufficient evidence that such written agreement had ever existed.

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license in respect of the Sovereign-street premises, which had not been previously licensed. The majority of the Justices being in favour of the application, the certificate was granted.

The prosecutor (a ratepayer and parishioner of Clonakilty) having obtained a conditional order for a writ of *certiorari* to quash the order of the Justices granting the certificate, and cause having been shown by Mrs. Ellen O'Mahony, the present application was to make the conditional order absolute, notwithstanding cause.

P. D. Fleming, K.C. (with him *Hon. Cecil Atkinson*), for the prosecutor :—

We submit that the case is not within section 3 of the Licensing (Ireland) Act, 1902, and that there was therefore no jurisdiction to grant the certificate. We rely on two points :—

First, a parol contract of tenancy is not a "lease" within the section. The word "lease" is not defined in any of the Licensing Acts. In its primary signification it is confined to written instruments, and this is the interpretation expressly given to the word in section 1 of the Landlord and Tenant Act (Ireland), 1860.

Secondly, the determination by notice to quit of a yearly tenancy is not an "expiration" within section 3 of the Act of 1902. The only way in which a lease can expire, as distinguished from being determined, is by running out: *Looby* v. *Finch* (1) *per* FitzGibbon, L.J. (p. 576). See also definition of "expiration" in New English Dictionary, 5 (*a*). Having regard to the nature of a tenancy from year to year as explained in *Wright* v. *Tracey* (2), such tenancy can never expire ; it can only be determined. *Hodges* v. *Clark* (3) may be relied on by the other side, but it has no application to a tenancy from year to year. Moreover, the case was questioned by Fitz Gibbon, L.J., in *Perrott* v. *Dennis* (4).

(1) 30 L. R. Ir. 568.
(2) I. R. 8 C. L. 478.
(3) 17 Ir. L. T. R. 83.
(4) 18 L. R. Ir. 29.

A. M. Sullivan, for Mrs. Ellen O'Mahony:—

"Lease" in section 3 of the Licensing (Ireland) Act, 1903, includes a parol letting. The general policy of the exceptions in that Act was to preserve vested interests, and there could be no object in drawing a distinction in this respect between tenancies created by writing and those created by parol. The word "lease" is wide enough to cover any contract, whether in writing or by parol, creating the relation of landlord and tenant between the parties. The definition of "lease" in section 1 of the Landlord and Tenant Act (Ireland), 1860, is expressly confined to the construction of the word in that Act, and has no application to the Licensing Acts.

"Expiration," I submit, means the coming to an end of the interest of the tenant by something not attributable to his own act, as distinguished from forfeiture. *Hodges* v. *Clark* (1) is conclusive as to this. The comment made on that case by Fitz-Gibbon, L.J., in *Perrott* v. *Dennis* (2) had no reference to the meaning given to the word "expiration." [He also referred to the Landlord and Tenant Act (Ireland), 1860, sections 28 and 29: *In re Browne's Estate* (3).]

Hon. Cecil Atkinson, in reply, referred to *The Queen* (*Clitheroe*) v. *Recorder of Dublin* (4); *The Queen* (*Cox*) v. *Recorder of Dublin* (5); *The Queen* v. *Justices of Cork* (6): Stroud's Judicial Dictionary, definition of "Lease."

Cur. adv. vult.

(1) 17 Ir. L. T. R. 83.
(2) 18 L. R. Ir. 29.
(3) Ir. R. 8 Eq. 297.
(4) I. R. 11 C. L. 412.
(5) 16 L. R. Ir. 424.
(6) [1900] 2 I. R. 105.

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Jan. 24.

PALLES, C. B. :—

We are to determine the meaning of two words in 2 Edw. 7, c. 18, s. 3, viz. "lease" and "expiration."

Since the Act of 1860 (23 & 24 Vict. c. 154) the expression "lease" in its ordinary sense includes any contract whereby an estate in lands passes from one person to another who is to hold from or under the first in consideration of rent. Such a contract, where the estate intended to be created is a freehold, or for any definite period of time, not being from year to year or any lesser period, must be by deed or note in writing; but to pass an estate from year to year a contract by word of mouth is sufficient (23 & 24 Vict. c. 154, s. 4). Mr. Atkinson relies on the definition of "lease" in that Act; but that definition is not a general one, it is limited to the construction of that Act which is not *in pari materiâ* with 2 Edw. 7, c. 18. Unless, therefore, there is something in the latter Act limiting its ordinary meaning, "lease" as there used must include the contract of tenancy here, in reference to which there is no note in writing.

I can find nothing in the 2 Edw. 7, c. 18, to limit the meaning of this word. On the contrary, I find much to show that it was intended to include the contract here. The mischief to be remedied by that Act was the undue multiplication of licensed houses. The remedy provided was a prohibition against the grant of licenses for premises which were not licensed at the time of the Act, or at some time after the previous 1st January. It was necessary, however, to make provision empowering new licenses to be granted in respect of previously unlicensed premises in certain exceptional cases, including the case of a license being extinguished or surrendered "by reason of the expiration of a lease," and it is in section 3, which provides for this exception, that we find the word "lease" which is now to be construed.

To understand this section, regard must be had to the state of the law as to licensing as it had been declared to be at the time of the Act.

It had been held in *Clitheroe's Case* (1) that the licensing authority

(1) I. R. 11 C. L. 412.

was not entitled to refuse a renewal of a license to the assignee of the estate of the licensed person in the licensed premises, upon the ground of the number of licensed houses in the neighbourhood; but that it was entitled to take that matter into consideration in case the applicant for the license, instead of being the assignee of, or claiming through, the licensed person, claimed by title paramount, as for instance would be the landlord of premises on the eviction of his tenant out of premises which were first licensed during the tenancy.

As stated by Lord Justice Fitz Gibbon in *The King* v. *Justices of Tipperary* (1) :—

> " Where a licensed person holds licensed premises, with his concurrence or on devolution of title from him in certain specified ways, but not otherwise, the license may pass with the premises by way of transfer; but where the connexion between the person and the premises is determined, and the common title to both license and premises is interrupted, I think the right to renewal or transfer is lost, and those claiming, either on personal grounds, as representing the holder of the former license, or as owners of the premises, must submit their claims to the Justices merely as applicants for new licenses."

It follows from this that, upon the " expiration " of a lease of licensed premises and the quitting of the tenant who was previously licensed, it depended on circumstances whether the license might be transferred in such a way that the transferee would obtain the benefit of the decision in *Clitheroe's Case* (2). If such circumstances existed, and if the license were so transferred, it remained an existing and operative license, and was not " extinguished or surrendered " within the meaning of section 3.

If, however, the circumstances were such that the person who acquired possession of the premises upon, and by reason of, the expiration of the lease did not become transferee of the license so as to be entitled to the benefit of the decision in *Clitheroe's Case* (2), the license became extinguished upon the licensed person quitting, and in that case (as well as in the case of the licensed person surrendering the license) the Justices had jurisdiction to grant a new license

(1) 6 L. R. Ir. 129. (2) I. R. 11 C. L. 412.

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for "suitable premises in the immediate vicinity of the" formerly licensed premises.

Now, the object of this provision being one for the benefit of the public, to prevent inconvenience to it by the permanent closing of a publichouse, presumably required, without a substitute being provided, the words should *primâ facie* be construed so as to make the remedy coextensive with the mischief; and as publichouses can be, and as we judicially know often are, held under tenancies from year to year created without writing, the word "lease" cannot be read in so restricted a sense as to exclude those tenancies.

The next point is the meaning of the word "expiration." That word has been defined so far back as the time of Plowden, in *Wrotesly* v. *Adams* (1). The question there arose upon two terms of years, one of which was limited to take effect "*after the end and expiration*" of the former term. The first term was determined by merger, and the question was whether the second term came into existence, which it could not do unless there had been not only an "end" but also an "expiration" of the former term. It was there said by the Court, "'expiration,' which is here used by similitude to things living, implies any end whatever. For as we signify by expiration the death of a man, and his last end, whatever way it happens, so the word 'expiration,' being applied to an estate for years, may aptly enough signify the end of it, whatever way it may be." Whether the doctrine applies to a freehold estate, I need not now stop to consider. In the present case it is clear that no difficulty arises from the ordinary meaning of the word.

I now come to its meaning in this particular section of the Act of Parliament. A question arose during the argument as to whether the word would apply to a determination by an eviction for non-payment of rent. It is not necessary to determine whether there is any special reason apparent on the face of the section to exclude its application to such a determination, and we offer no opinion whatever as to that. I confine myself to saying that, in my opinion, it certainly includes any ending of the estate by virtue of the contract.

(1) Plowd. 187; see p. 198.

I do not intend to occupy time by quoting the many familiar cases, such as *Doe* d. *Oxley* v. *James* (1), *Jones* v. *Mills* (2), or *Wright* v. *Tracey* (3), as to the nature of a tenancy from year to year. Whether it is viewed in its modern development, as it is in *Doe* d. *Oxley* v. *James* (1) and *Wright* v. *Tracey* (3), as a term for a year, with an additional term for a year springing out of it each year in the event of a non-service of a notice to quit, or in the more ancient form of that from which it springs, an estate at will, with a restriction as to the time at which, and the mode in which, the will, as to its determination, is to be expressed—in either case the contract is that the estate shall end at the end of any year of the tenancy in relation to which a notice to quit has been duly served, and this ending, being *in pursuance of the contract*, is, in my opinion, an expiration within the meaning of the section.

In *Hodges* v. *Clarke* (4) the Exchequer Division put a similar construction on the word "expiration" in section 21 of the Land Law (Ireland) Act, 1881. One of the points decided there did not meet with the approval of Fitz Gibbon, L.J., in *Perrott* v. *Dennis* (5); but neither his disapproval, nor his reasons for it, extended, as I understand the judgment, to the meaning which the Exchequer Division put on the word.

The conditional order must be discharged, with costs.

JOHNSON, J.:—

I entirely concur. I think the term "lease" in the Act of 1902, section 3, is used in its natural and legal sense, viz. a contract for the possession and profits of lands or tenements for a determined period: 1 Furlong, Landlord & Tenant, p. 130; Co. Litt., c. 7, section 58, p. 43 b; and if the contract exceeds three years, must be in writing; and I think the expression in the same section, "expiration of a lease," signifies, in its ordinary use in the English language, that the "lease" ceases to

(1) 13 M. & W. 209.
(2) 10 C. B. (N. S.) 788.
(3) I. R. 8 C. L. 478.
(4) 17 Ir. L. T. R. 83.
(5) 18 L. R. Ir. 29.

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continue pursuant to the contract of the parties, with the legal incidents and consequences flowing from such expiration or cesser of the lease.

KENNY, J., concurred.

Solicitors for the prosecutor: *Thomas R. Wright & Son.*
Solicitor for Miss Ellen O'Mahony: *P. W. O'Donovan.*

J. G. T.

WHITMORE *v.* O'REILLY (1).

(1904. No. 14,870.)

K. B. Div.
1905.
Nov. 27.
1906.
Jan. 27.
Appeal.
Feb. 16, 17, 19, 27.

Costs—Trial by Judge without jury—Trivial action—Successful plaintiff ordered to pay costs—Discretion of Judge—Supreme Court of Judicature Act (Ireland), 1877 (40 & 41 *Vict. c.* 57), *ss.* 52, 53.

The plaintiff brought an action against the defendant, his tenant under a yearly tenancy, for breaches of agreement to keep the demised premises in repair, claiming £30 damages. The defendant in her defence, in addition to traversing the alleged breaches, denied the alleged agreement, denied that she had ever been tenant of plaintiff, and further alleged that the tenancy had been determined by notice to quit before the matters complained of. The action was tried by a Judge without a jury, and at the trial the plaintiff's own estimate of his loss was from £5 to £6. The Judge assessed the damages at £1. He gave judgment for the plaintiff for that amount, with such costs as a decree for £1 would carry in the County Court, and made an order that the plaintiff should pay the defendant's costs of the action less £1 damages and such civil-bill costs as above mentioned, on the ground, as alleged in the order, that the action should have been brought in the Civil-bill Court and was quite unfit to be tried in the Superior Courts. The Judge, in his report, further stated that he was of opinion that the action was one of the most trivial and insignificant that could possibly be brought; that the plaintiff's own estimate of his loss was grossly exaggerated; that he considered it wrong and an abuse to bring such an action in the Superior Courts: and that the plaintiff should pay the penalty of the extra costs thereby occasioned. The plaintiff having moved to have the order varied by directing the defendant to pay plaintiff half his costs of the action, and directing defendant to bear her own costs thereof:—

Held, in the King's Bench Division, by Lord O'Brien, L.C.J., and Boyd, J. (Johnson and Gibson, JJ., *diss.*), and *held*, by the Court of Appeal, that there were materials before the Judge at the trial sufficient to justify him in exercising his discretion of ordering the plaintiff to pay the defendant's costs, and that his order in this respect was not subject to review.

MOTION to vary an order of Wright, J., made on trial of action.

The action was brought by the plaintiff, who resided at Kingstown, in the county of Dublin, against the defendant, who

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and JOHNSON, GIBSON, and BOYD, JJ.

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resided in the city of Dublin, claiming £30 for damages sustained by the plaintiff through the injury and dilapidation of the premises, No. 17, Carysfort-avenue, Blackrock, county Dublin, held from plaintiff by defendant as tenant from year to year, caused by the neglect and default of the defendant.

The first paragraph of the statement of claim alleged that the plaintiff had suffered damage from breaches by the defendant of her agreement with the plaintiff, under which she had been tenant to the plaintiff, or his predecessors in title, of the house in question, upon the terms that she should keep the said house during the tenancy thereof in tenantable repair. The particulars of the breaches, as set out in the statement of claim, were that the windows of the house in front and back had been broken, and the premises damaged by trespassers, through defendant's neglect in leaving the premises open and derelict, and that a paling had been bodily removed, viz. a wooden paling which was erected at the back of the house and permanently fixed into walls and into the ground. In the alternative, the plaintiff, in the second paragraph of the statement of claim, claimed damages for waste in respect of the same matters.

The statement of defence was as follows:—

"1. There was no agreement between the plaintiff, or his predecessor in title, and the defendant, as in paragraph 1 alleged, or at all.

"2. It was not a term of the said agreement that the defendant should keep the house in tenantable repair.

"3. The defendant is not, and never was, tenant to the plaintiff on a tenancy from year to year, or any tenancy.

"4. The defendant at all times during the tenancy kept the house in tenantable repair.

"5. The house was not during the tenancy out of such repair as was required by the agreement under which defendant held the said house.

"6. The defendant during the tenancy observed the agreement entered into by her as to the repair of said premises.

"7. The defendant denies the several acts and matters complained of in the statement of claim, respectively.

"8. The defendant did not commit the alleged or any waste.

WHITMORE *v.* O'REILLY (1).

(1904. No. 14,870.)

K. B. Div.
1905.
Nov. 27.
1906.
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Feb. 16, 17, 19, 27.

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"5. The house was not during the tenancy out of such repair as was required by the agreement under which defendant held the said house.

"6. The defendant during the tenancy observed the agreement entered into by her as to the repair of said premises.

"7. The defendant denies the several acts and matters complained of in the statement of claim, respectively.

"8. The defendant did not commit the alleged or any waste.

"9. Prior to the acts and matters complained of the defendant had ceased to be tenant of said house, and had ceased to be either in occupation or possession of said house.

"10. The tenancy created by said agreement was determined by effluxion of time.

"11. The tenancies referred to in paragraphs 1 and 2, and each of them, were determined by notice to quit before the acts and matters complained of."

The plaintiff joined issue on the statement of defence.

The action was tried by Wright, J., without a jury on the 17th May, 1905. The report of the learned Judge, after stating the nature of the action, proceeded as follows:—

"The evidence was to the effect that defendant had been tenant of the house to plaintiff for some years, but left towards the end of September, 1904, because she complained that the plaintiff would not put the roof into proper repair so as to keep out the rain, and that a few panes of glass had been broken, some before and some after she left, and part of the old paling, valued at a few shillings, had disappeared, having been probably taken away by people in the neighbourhood. This was all the damage alleged or of which any evidence was given.

"I assessed the damage done at £1, and gave judgment for that amount with civil-bill costs, and made a further order as to the general costs of the action, as appears by the Registrar's certificate, to which I refer. I was of opinion that the action was one of the most trivial and insignificant that could possibly be brought, and that it should never have been commenced by writ in the Superior Courts. Plaintiff's own estimate of his loss on all claims was only £5 to £6, and this figure was, in my opinion, greatly exaggerated. I considered that it was wrong and an abuse to bring such an action in the Superior Courts, and that the plaintiff should pay the penalty of the extra costs thereby occasioned, and, accordingly, I gave judgment for plaintiff for £1, with civil-bill costs, but directed him to pay defendant's general costs of the action, less by the sum of £1, and such civil-bill costs. See Registrar's certificate."

The Registrar's certificate stated that the Judge found for the plaintiff on foot of the cause of action set forth in paragraph 1

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of the statement of claim, with £1 damages, and with such costs as a decree for £1 would carry in the Civil Bill Court, and against the plaintiff on the cause of action set forth in paragraph 2 of the said statement of claim. It then set out the following order made by the Judge:—

"I order that the plaintiff do pay the defendant all her costs, when taxed and ascertained, incurred by her in this action, as I am of opinion that this action should have been brought in the Civil Bill Court, and was a quite unfit case to be tried in one of the Superior Courts, less by the £1 damages and costs awarded to the plaintiff as above stated."

The plaintiff now moved that the judgment, certificate, or order made by Wright, J., should be varied by directing the defendant to pay the plaintiff half his costs of the action, and by directing the defendant to bear and pay her own costs thereof, on the grounds that the said judgment, certificate, or order was bad and erroneous in law, and was against evidence and the weight of evidence, and because the learned Judge misdirected himself upon the law, and because the learned Judge in depriving the plaintiff of his costs and in directing the plaintiff to pay the defendant's costs did not exercise a judicial discretion, nor exercise such discretion upon adequate materials, or upon materials properly before the Judge, nor upon matters and materials it was competent for the Judge to treat as grounds for the exercise of his discretion, but proceeded upon a wrong principle, and erroneously. The motion was stated to be grounded upon, *inter alia*, the Judge's notes.

There was a cross-motion by the defendant for liberty to enter up judgment against the plaintiff for her costs of the action, when taxed and ascertained, less the sum of £1, damages awarded to the plaintiff, and such costs as a decree for £1 would carry in the Civil Bill Court.

Hanbury Geoghegan, for the plaintiff:—

There were no materials before Wright, J., to justify him in depriving the plaintiff of costs, and ordering him to pay the defendant's costs. The discretion of the Judge as to costs is a judicial discretion, and must be exercised on adequate materials.

The only ground here alleged is the unfitness of the action for the Superior Court, by reason of its triviality. But that case is provided for by Order LXV., Rule 3, under which the plaintiff here would be entitled to only half costs. To justify depriving a successful plaintiff of the whole of his costs, and *a fortiori* to justify an order that he should pay the unsuccessful defendant's costs, there must be something more than the mere smallness of the amount recovered.

The defendant here in her defence traversed the existence of a tenancy; Wright, J., decided that a tenancy existed. Therefore, over and above the damages recovered, a question of property was determined: a question involving the liability of the defendant for subsequent rent.

[He referred to *Civil Service Co-operative Society* v. *General Steam Navigation Company* (1); *Granville* v. *Frith* (2); *Wilson* v. *M'Mains* (3)].

William M'Grath, for the defendant:—

Wright, J., exercised his discretion as to the costs, and exercised it upon sufficient materials, therefore no appeal lies from his order: Judicature Act (Ireland), 1877, sect. 52; *Harrison* v. *Ancketell* (4); *Kay & Co.* v. *Tighe* (5). The Judge has power not only to refuse a successful party his costs, but to order him to pay the costs of the unsuccessful party: *Harris* v. *Petherick* (6); *Fane* v. *Fane* (7). *Wilson* v. *M'Mains* (3) was an action tried before a jury, and is therefore distinguishable.

Geoghegan, in reply, referred to *Bew* v. *Bew* (8); *Lapsley* v. *Blee* (9).

Cur. adv. vult.

(1) [1903] 2 K. B. 756.
(2) 72 L. J. (N. S.) K. B. 152.
(3) 20 L. R. Ir. 582, 590.
(4) 39 Ir. L. T. R. 241.
(5) 18 L. R. Ir. 40.
(6) 4 Q. B. D. 611.
(7) 13 Ch. D. 228.
(8) [1899] 2 Ch. 467.
(9) 6 L. R. Ir. 155.

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Jan. 27.

BOYD, J.:—

In this case the action has been brought to recover £30 damages for—(1) breach by the defendant of her agreement to keep in repair a house which she held as tenant to the plaintiff; and (2) for wrongfully committing waste in the said house by damaging the windows thereof, and by pulling down and removing a certain paling or fence, and disposing of same to her own use.

The first cause of action is for breach of an agreement; and the second for acts of commission by the defendant.

As far as I can see from the report of the learned Judge who tried the case, without a jury, there was no evidence given by the plaintiff as to his alleged second cause of action. It appears, from the said report, that the defendant had been a yearly tenant of the house for some years, but left the premises towards the end of September, 1904, because she complained that the plaintiff would not put the roof into proper repair to keep out the rain; and that a few panes of glass had been broken, some before and some after she left, and part of an old paling, valued at a few shillings, had disappeared, having probably been taken away by the people in the neighbourhood. The report further states that this was all the damage complained of. From this report of the case, it is manifest that it was one of the most trumpery cases imaginable, and one which would have been remitted to the County Court Judge to dispose of had the plaintiff possessed no visible means of paying costs. He, fortunately for himself, but unfortunately for the defendant, was possessed of visible means, and, accordingly, the defendant could not apply to the Court to have the action remitted, though it was manifestly one which never should have been brought in the High Court, and, to my mind, it was an abuse of the process of the High Court to have brought such an action in that Court, and was gross injustice to, and hardship upon, the defendant.

The plaintiff in his writ claims £30 damages, but at the trial he never even attempted to prove that the damages amounted to more than £5 or £6, which the learned Judge reports he considered "greatly exaggerated," and he, on the first cause of action, assessed the damage done at £1, and gave judgment for that

amount with such costs as a decree in the Civil Bill Court for that amount would carry; and he found for the defendant on the second cause of action.

He also ordered "that the plaintiff do pay the defendant all her costs, when taxed and ascertained, incurred by her in this action, as I am of opinion that this action should have been brought in the Civil Bill Court, and was a quite unfit case to be tried in one of the Superior Courts, less by the £1 damages and costs awarded to the plaintiff, as above stated."

In the motion before us the plaintiff asks that the said order may be varied by directing the defendant to pay the plaintiff half his costs of the action, and by directing the defendant to bear and pay her own costs thereof; and he also asks for the costs of the motion, and of a motion made to the Court of Appeal on the 20th day of June, 1905. The plaintiff, it is to be observed, only asks that the portion of the order dealing with the costs may be varied, and his appeal is limited to that question. I have stated that I consider it was a most unjust and oppressive proceeding on the part of the plaintiff to have brought an action in the Superior Court, when before he commenced the action he knew perfectly well, or should have known, that his damage could not, under any circumstances, exceed £5 or £6; and the Judge, in his certificate, states it was "a quite unfit case" to be tried in one of the Superior Courts. In his report he further states that it was one of the "most trivial and insignificant that could possibly be brought, and that it should never have been commenced by writ in the Superior Court."

I am of opinion that we have no right to disregard the opinion so forcibly expressed by the learned Judge, and we must also bear in mind that he had an opportunity of seeing and hearing the witnesses, and forming his opinion on all the circumstances of the case, which we have not.

The grounds stated in the notice of motion, on which the plaintiff asks us to reverse the order appealed from, are, that the judgment, order, or certificate of the learned Judge is bad and erroneous in law, and is against evidence, and the weight of evidence, and because the learned Judge misdirected himself upon the law, and because he did not exercise a judicial discretion, nor

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exercise such discretion on adequate materials, nor upon materials which it was competent for the Judge to treat as grounds for the exercise of his discretion.

By section 53 of the Judicature Act (Ireland), 1877, it is expressly enacted that "subject to the provisions of this Act, and of rules of Court, the costs of and incident to every proceeding in the High Court of Justice . . . shall be in the discretion of the Court." The section then proceeds to except from this discretion a trustee, mortgagee, or other person from being deprived of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted on in Courts of Equity. It then provides, in reference to cases tried by a jury, and enacts, that in such cases the costs of every action, question, and issue, shall follow the event, unless, upon application made, the Judge at the trial or the Court shall, for special cause shown or mentioned in the order, otherwise direct; and any order of a Judge, as to such costs, may be discharged or varied by a Divisional Court.

The section thus provides that in cases tried by a Judge himself he shall have absolute discretion to decide as to the costs of the action; but that in jury cases the costs shall follow the event unless the judge shall, upon application made, and for special grounds to be stated in his order, otherwise direct.

Section 52 enacts that no order made by any Judge of the High Court as to costs only, which by law are left to his discretion, shall be subject to any appeal unless by his leave. No such leave has been obtained in this case.

This case was tried by Mr. Justice Wright without a jury, and he, therefore, had absolute discretion as to the costs, and was not bound to give any reasons for his decision.

Myers v. *Financial News* (1) was an action for libel in which a plea of justification was filed, and was tried by a Judge with a jury. The jury found a verdict for the plaintiff for one farthing. Huddleston, B., not only deprived the plaintiff of his costs, but ordered him to pay the costs of the defendant, holding from the facts of the case there was "good cause" for making such order.

(1) 5 *Times* L. R. 42.

In his judgment he refers to another case in which the jury found for the plaintiff with £10 damages, and he made an order depriving her of the costs of the action, and the Court of Appeal upheld his decision.

Harris v. *Petherick* (1) was another case of a trial by jury in which the plaintiff sued on two causes of action, claiming in respect of one cause £85, and in the other the sum of 6*s*. The jury found for the defendant on the first cause, and for the plaintiff on the second. The case was twice tried. On the first occasion the plaintiff was non-suited; a second trial was ordered, and upon the second trial the jury found for the plaintiff on the second cause of action, but against him on the first. Manisty, J., made an order that the plaintiff should pay the costs of both trials. The plaintiff appealed against this order, but Cockburn, C.J., and Mellor, J., affirmed his order. The plaintiff then went to the Appeal Court, and Bramwell, L.J., in his judgment affirming the order, says—"It appears to me clear that, where an action has been tried without a jury, the circumstance that the plaintiff has recovered something will not of itself relieve him from liability to pay the defendant's costs," and, further, that even in a jury case "the Judge has power to direct that a plaintiff shall pay the costs of the action although he obtains judgment for a small amount," on the grounds that the result of the trial shows that the defendant has been wrongfully harassed with a vexatious action, and that his resistance to the plaintiff has been made *bona fide*. Brett and Cotton, L.JJ., concurred with this decision.

In *Williams* v. *Ward* (2) which also was a jury case, the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) upheld the order of the Judge, on the ground that the defendant "had been forced into expensive litigation the result of which shows that he was substantially right although he had exceeded the truth in some small infinitesimal way. This is oppressive, and therefore 'good cause' for the Judge to exercise his discretion"; and Lord Esher adds, "We must stop here and decline to consider how far he exercised that discretion rightly."

These cases were all cases of trial by jury, where "good cause"

(1) 4 Q. B. D. 611. (2) 55 L. J. (N. S.) Q. B. 566.

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should exist to enable a Judge to make an order depriving a successful plaintiff of his costs or ordering him to pay the costs of the defendant. In cases tried by a Judge without a jury, the Judge's discretion is absolute, and cannot be reviewed unless there has been disregard of principle or misapprehension of facts, even though the Judge may have given leave to appeal: *Young* v. *Thomas* (1); *Llanover* v. *Homfrey* (2); *Games* v. *Bonnor* (3). In the last-mentioned case the Lord Chancellor (Lord Selborne), at p. 520, says: "It appears to the Court that unless the appellant succeeds on the questions of substance, he cannot ask us to review the question of costs. The rule is that, inasmuch as costs alone are not the subject of appeal, unless a substantial alteration is made in the order upon the same points as were argued below, the fact of there being a question raised on which the appellant does not succeed does not entitle the appellant to go into the question of costs on an appeal."

Florence v. *Mallinson* (4) was a case in which the plaintiff sought an injunction to compel the defendants to remove a wall and buildings, and damages for obstruction of light, and for negligence in carrying out the defendant's works. On the question of light, Kekewich, J., assessed the damages at 40*s*., and on the other causes of action found for the defendant with costs. The plaintiff appealed from this order on various grounds, amongst others on the order giving the defendant costs, although the plaintiff had succeeded on the question of light. The Court of Appeal, as to the order for costs, held that this was an action in which the costs were in the discretion of the Judge, and that there was no appeal from that order. Lindley, L.J., at p. 358, says: "I would add on the point as to costs that it was settled conclusively by *Harris* v. *Petherick* (5) that a Judge has power to order a plaintiff who recovers a nominal sum to pay the defendant's costs. Therefore, it cannot be said because the plaintiff gets 40*s*. damages he is entitled to costs of the action." Bowen, L.J., gave judgment to the same effect.

In *Garnett* v. *Bradley* (6), Lord Hatherley, C., at p. 955, very clearly states the change in the law effected by the Judicature

(1) [1892] 2 Ch. 134.
(2) 19 Ch. D. at p. 232.
(3) 54 L. J. Ch. (N. S.) 517.
(4) 65 L. T. (N. S.) 354.
(5) 4 Q. B. D. 611.
(6) 3 A. C. 944.

Act as to the power of the Common Law Judges in reference to the costs of actions, and further states the law now to be that in every class of suit, whatever might be the character of the action or the position of the parties, there was a power left to the Judge in his absolute discretion (meaning of course his judicial discretion) to determine the question of costs, but that in jury trials the costs should follow the event unless the Judge should otherwise order; and at p. 964, Lord Blackburn states: "If the plaintiff recovers when the action is tried before a Judge alone, the costs are not to be recovered absolutely, but are to be at the discretion of the Judge; if he recovers when the action is tried before a jury, there is to be a different rule: 'the costs shall follow the event' ... unless upon application made at the trial for good cause shown an order shall have been made otherwise."

In *Wilson* v. *M'Mains* (1), which was an action for seduction, the jury found a verdict for £10, and Murphy, J., before whom the case was tried, made an order depriving the plaintiff of costs on the grounds that "the circumstances out of which the cause of action arose and the position of the parties—plaintiff and defendant"—did not warrant the action having been brought in the Superior Court. The Court of Queen's Bench (O'Brien and Lawson, JJ.; Johnson, J., *diss.*) affirmed the order; but the Court of Appeal reversed it on the grounds that the mere fact of an action having been brought in the Superior Court which might have been brought in the County Court, was not of itself sufficient "special cause" to deprive the plaintiff of his costs.

These were all jury cases, in which it is necessary for the Judge, making an order to deprive a successful party of his costs, to show "special cause mentioned in his order" for so doing.

In cases tried by a Judge without a jury the law gives to the Judge absolute judicial discretion over the costs of the action; and the 52nd section of the Judicature Act enacts that no appeal shall lie from an order of a Judge as to costs only, being costs which by law are left to the discretion of the Court, unless by leave of the Court or Judge making such order.

(1) 20 L. R. Ir. 582.

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Boyd, J.

There are some cases in which the Courts on appeal have considered the orders made by Judges as to costs; but in no case in recent times, since the law on the subject has been settled by judicial decisions, have the Courts interfered with the order of the Judge as to costs only, unless it appears that he has not exercised his discretion, but has applied some rule which he considered as excluding it.

Bew v. *Bew* (1) is decisive on this point. In that case the action was by a husband against his wife to establish against her a trust in his favour of a sum of £300. Kekewich, J., at the trial found in favour of the plaintiff, but declared that the wife had been trustee for the plaintiff, and made an order that her costs, charges, and expenses as trustee should be paid out of the fund. The plaintiff appealed from that order, and the appeal was heard by Lindley, M.R., Sir F. H. Jeune and Romer, L.J. Before giving their decision they consulted with the Judges of the other branch of the Appeal Court. Lindley, M.R., in giving the judgment of the Court refers to the 49th section of the Judicature Act, 1873, which is precisely similar to the 52nd section of the Irish Act, and refers to the several conflicting decisions on the subject of appeal as to costs, and, adopting the decision in *The City of Manchester* (2), states the law to be "that if the costs are in the discretion of the Judge, the Court of Appeal will assume that the Judge exercised his discretion, unless it is satisfied that he has not exercised his discretion, but has applied some rule which in fact excluded his discretion." In *King & Co.* v. *Gillard & Co.* (3) the Court of Appeal applied the same principle, and reversed the order of Kekewich, J., on the ground that the Judge based his decision on the ground of the improper conduct of the defendants in respect of matters not connected with the issue between themselves and the plaintiffs, and this was not therefore a ground on which the Judge had a discretion to deprive the defendants of costs.

In the present case, which is an appeal in respect of costs only, the Judge bases his order not upon collateral matters, but upon the facts arising in the action between the parties; and I cannot reverse the order of the Judge, because I am not, to use the

(1) [1899] 2 Ch. 467. (2) 5 P. D. 221. (3) [1905] 2 Ch. 7.

language of Lindley, M.R., "satisfied that he has not exercised his discretion, but has applied some rule which in fact excluded his discretion." He states expressly that he considered "it was wrong and an abuse to bring such an action in the Superior Courts," and also "the action was one of the most trivial and insignificant that could possibly be brought." In the present case the Judge exercised the powers conferred upon him, and in his discretion has made the order complained of. Had he made no order, the plaintiff could not recover any costs. He was not obliged to make any special order. It was in his absolute judicial discretion whether he should make any order, and, if so, what that order should be. He was not bound to assign any reasons for making an order.

Now, what are the facts existing in the present case. The defendant was tenant to the plaintiff of a house manifestly in a dilapidated condition owing to the default of the plaintiff to keep the roof in repair, and in consequence she was obliged to terminate her tenancy and leave the premises. A few panes of glass were broken when she left, and some others afterwards broken, as stated by the Judge. An old paling was removed, when does not appear by the report, but it may have appeared to the Judge that this also was removed after the defendant left the house. Apparently without notice to the defendant an action is brought against her by the plaintiff, who, by his default, had allowed the place to become untenantable. All the facts do not appear on the report of the learned Judge; but having all the facts and circumstances before him, and having seen and heard the witnesses, he came to the conclusion it was a "quite unfit" case to have been brought in the Superior Court, and, as he states in his report, the action was one of the most trivial and insignificant that could possibly be brought, and that it should never have been commenced by writ in the Superior Courts. He, no doubt, formed the opinion that it was an act of hardship and oppression by the plaintiff on the defendant to have sought to impose on her the costs, which would be far greater than any damages that he could possibly recover, even according to the plaintiff's own exaggerated evidence thereof.

I am of opinion that this motion, which is entirely as regards the costs, which are by law in the absolute discretion of the Judge,

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with which we have no right to interfere, should be refused with costs.

GIBSON, J.:—

The question raised as to the law of costs is of unusual importance. Does the fact that an action, within County Court jurisdiction, is deemed by the Judge unfit for the High Court, justify an order that the plaintiff be condemned in costs, though he has established in part the main cause of action that he came to try—which though small—was for a real breach of contract which defendant had disputed? Upon the argument addressed to the Court, in every case where a Judge refuses to certify under Order LXV., R. 4, he has ground, whether the trial is before a jury or not, if he chooses, in addition to complete or partial deprivation of costs under that rule, to make a special order that the plaintiff, though successful, shall pay the defendant's costs. This is so completely opposed to the common practice, and involves such serious consequences to litigants, that I have examined the principles and authorities governing the exercise of judicial discretion with considerable care, and I have come to the conclusion that the order under review is erroneous, whether we look at the reasons on which it professes to be based, or at the facts stated in the report. I am aware of no authority going nearly so far, and principle is adverse to such a punitive order in a case like the present.

The action was brought for breach of contract to keep in repair, with an alternative claim for waste, which was found in favour of the defendant. As this was a mere pleading form in which no substantial costs could be recovered (*Walsh* v. *Spillane* (1)), it may be dismissed from our consideration. The defendant is entitled to costs properly attributable to that issue. The plaintiff was awarded £1 damages for breach of contract, but was ordered to pay all the costs of action, subject to a deduction of civil-bill costs in respect of the £1 recovered. The order was of a discretionary character, and, though the Judge has set forth his reasons, which we must consider, it was not necessary to state in the order any grounds. From a discretionary order there is no appeal without

(1) 37 Ir. L. T. R. 231.

leave, unless the Judge had no materials before him to justify the order: *Civil Service Co-operative Society, Limited*, v. *General Steam Navigation Company* (1); or unless he has acted on an erroneous principle: *King* v. *Gillard* (2); *Bew* v. *Bew* (3); or unless there was no reasonable exercise of discretion at all: *Jones* v. *Curling* (4).

The broad principle is that where a Judge acts on grounds not legitimate for his consideration, there is no due exercise of jurisdiction, and his order, though discretionary, can be corrected: *Reg.* v. *Bishop of London* (5); *Reg.* v. *Woodlock* (6). His discretion is judicial, not arbitrary, and is to proceed on the practice of the Court, which is the law of the Court: *Wilson* v. *Rastall* (7). Where there are grounds to justify the particular exercise of discretion, and there has been no mistake of principle, the decision of the Judge cannot be reviewed.

Does this order disclose a legitimate exercise of discretion? Order LXV. contains a body of rules reducing a plaintiff's costs, or depriving him of costs altogether, with reference to the amount recovered, and the unfitness of the action for the High Court, whether the action is tried with a jury or not. It has special rules cutting down costs in actions within County Court jurisdiction: Order LXV., Rule 65, sub-Rules 41 and 42. There is, in addition, a power of remitting under the Act of 1870; and where the amount claimed is for a debt of £2 or under, the Court directs the writ to be taken off the file, as below its dignity, though it refused to do so where the action was for £3 11*s.*: *Hannay* v. *Graham* (8). In addition to those automatic checks and penalties, can a Judge in the exercise of his discretion, on the very same grounds for which the rules prescribe a specific punishment, condemn a successful plaintiff in costs, and thereby put the defendant, who had wrongfully contested the whole action, in practically the same position as if he had paid the sum recovered into Court as a defence? Under this order defendant gets the costs of all her false pleas and the issues thereon. There may be arguments from

(1) [1903] 2 K. B. at p. 765.
(2) [1905] 2 Ch. 7.
(3) [1899] 2 Ch. 467.
(4) 13 Q. B. D. at p. 271.
(5) 24 Q. B. D. 213.
(6) 12 L. R. Ir. 173.
(7) 4 T. R. at p. 757.
(8) 12 L. R. Ir. 413.

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convenience both ways. I can find no case where a plaintiff who has won on his main cause of action, contested by the defendant, has been ordered to pay such defendant's costs.

As nearly all the authorities directly bearing on the point are English, I shall first examine the English cases, in considering which we must recollect that the English costs rules contain no such statutory limitations as are found in our code, which indicate to some extent the principles to govern the exercise of judicial discretion. The cases chiefly relate to what is good or special cause where there has been a jury trial, and most refer to forfeiture of costs. They are important as showing the considerations on which the Court should act. Most valuable guidance will be found in the established practice in equity, where discretion was not fettered by statute or rules. The equity cases are summarized in Daniell (ed. 1901), pp. 970 to 980.

The distinction between refusing costs—as a mark of disapproval—and inflicting costs as a punishment is illustrated by *Foster's Case* (1) (based on the Chancery practice), and *Andrew* v. *Grove* (2), where it was held that a victorious defendant could not be ordered to pay the plaintiff's costs, though he could be deprived of costs: *Bostock's Case* (3). A wider jurisdiction existed in the case of plaintiffs, and under very special circumstances, quite unlike those before us, before the Judicature Act, a successful plaintiff was made to pay costs (see Daniell's Ch. Pr., p. 980). Since the Judicature Act there have been a few exceptional cases of the same type. They were cases where either the plaintiff had substantially failed, and the action was vexatious: *Harris* v. *Petherick* (4); *Williams* v. *Ward* (5); or where the plaintiff recovering contemptuous damages in a libel action had brought the litigation on himself: *Myer's Case* (6); *Williams* v. *Ward* (5); *MacGregor* v. *Clay* (7); or where no action at all was necessary: *Fane* v. *Fane* (8). These cases are all very special, and bear no resemblance to the considerations on which my brother Wright acted as to the facts before him. They all proceed on the ground

(1) 8 Q. B. D. 515.
(2) [1902] 1 K. B. 625.
(3) [1900] 2 Q. B. 616.
(4) 4 Q. B. D. 611.
(5) 55 L. J. (N. S.) Q. B. 566.
(6) 5 *Times* L. R. 42.
(7) 4 *Times* L. R. 715.
(8) 13 Ch. D. 228.

that the action had substantially failed, not on the ground that a real cause of action had been tried in a wrong forum. They all occurred in the early years of Judicature practice, and there is no recent example of the kind.

Nearly all the reported decisions relate to depriving a successful plaintiff or defendant of costs. To such deprivation, as a mark of judicial disapprobation, different considerations apply. Costs are considered as a kind of testimonial of good conduct (Daniell, p. 973). What is "good cause" for deprivation depends on what is just and fair between the parties: *Forster* v. *Farquhar* (1); *Jones* v. *Curling* (2). Everything which unduly enhances the burden and costs of the litigation: *Huxley's Case* (3); such as an exorbitant claim recklessly made: *Jones* v. *Curling* (2), is good cause for deprivation, particularly where there are no distinct issues on which the litigant, if succeeding, could recover costs: *Huxley's Case* (4); *Jones* v. *Curling* (2); *Forster* v. *Farquhar* (1). There are numerous decisions of this class; but though in many the action was held to be frivolous and vexatious, the penalty of paying costs was not imposed.

I doubt if Lord Halsbury's remarks in *Huxley's Case* (3) were intended to apply to the litigant's choice of the Superior instead of the County Court. If they extended to such a case, then in all actions within the inferior jurisdiction tried in the High Court, the Judge, if he chose, would be able to deprive the plaintiff of costs, or condemn him in costs, as he might deem the selection of the more expensive tribunal oppressive, and from his decision, founded *ex hypothesi* on good cause, there would be no appeal: *Bostock's Case* (5). Cases of a trivial character are of everyday occurrence in England, and costs follow the event. Even a farthing has that result, as it still has in this country, in case of breach of promise actions. I am not aware of any instance where, on the ground of choice of tribunal, the Court has ever been asked to deprive a plaintiff of costs. The equity cases to be noticed presently are quite opposed to the present order, which goes beyond deprivation.

(1) [1893] 1 Q. B. 564. (2) 13 Q. B. D. 262.
(3) 14 A. C. 26. (4) 14 A. C. at p. 35. (5) [1900] 2 Q. B. at p. 621.

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The authorities, where smallness of the sum recovered as cause for deprivation was considered, more nearly touch the matter in hand. In *O'Connor's Case* (1), where the plaintiff in a libel action was awarded one farthing damages, the Court of Appeal deprived Mrs. O'Connor of costs (they did not make her pay them) on the ground that the action was not brought for personal vindication, but for an indirect object. The majority of the Court held that the mere smallness of the damages was not, *per se*, good cause, though it might be a factor, as where the verdict showed that no action at all should have been brought. *Moore* v. *Gill* (2) decides the same point. These decisions appear necessarily to involve that suing in the High Court for a small demand within County Court jurisdiction would not be good cause for deprivation, *per se*. In *Wilson* v. *M'Mains* (3), an action of seduction, our Court of Appeal held that it was not good cause to deprive plaintiff of costs that the action was within the Civil Bill jurisdiction, and that no more than £10 damages could have been expected. This is the only Common Law authority, that I am aware of, where the question of superior cheapness of forum was considered as a possible element in good and special cause, and the reasoning in the judgments is relevant here. No doubt the question there was as to the grounds necessary to justify a special order; but if the reasons assigned in the present order are valid, they would constitute sufficient ground of deprivation applicable to a similar verdict of a jury. The Judge's discretion must be exercised in accordance with settled principles, and the judgments in the case referred to are adverse to the grounds assigned for the present order. In *Lyons* v. *Peacock* (4), an action not tried by a jury, a claim in contract for £387 0*s.* 7*d.* was reduced by the Master to £7 7*s.* 3*d.* (a higher percentage than here), yet the Court refused to deprive the plaintiff of costs, or make him pay costs, though they allowed no costs of the proceedings before the Master. Actions for dilapidations, like the present, are of a peculiarly uncertain character, and juries often award only small or nominal damages. It would be a serious matter if, on a verdict for such damages, the Judge, who is bound to act on the jury view,

(1) 68 L. T. (N. S.) 146.
(2) 4 *Times* L. R. 738.
(3) 20 L. R. Ir. 582.
(4) 12 L. R. Ir. 148.

could be called on to visit the plaintiff with costs, because, in result, the action proved to be unfit for the Superior Court

I now turn to the order which states the Judge's reasons:— "The action should have been brought in the Civil Bill Court, and was a quite unfit one to be tried in one of the Superior Courts." That is the very case contemplated by Order LXV., Rule 4. The Judge has allowed civil-bill costs (which would be about 3*s*.). This would be in accordance with the equity cases: *Simons* v. *M'Adams* (1); *Crozier* v. *Dowsett* (2); though Jessel, M.R., in *Brown* v. *Rye* (3), took a different view; but in these cases the Court never thought of making the plaintiff pay costs. The order, unlike all those where plaintiff was condemned in costs, gives nominal costs, and is based, not on the groundlessness of the action or any misconduct of the plaintiff during the litigation, but solely and entirely on the unfitness of the case for trial in the High Court.

The report is subsequent to the order, and it is doubtful whether, in construing the order and its reasons, we can consider the report as explanatory; but I shall assume that this may be done, as the order relates to a concrete case. The action was substantially for breach of contract—the claim for waste being a mere pleading form. The plaintiff claimed more than he was entitled to; the defendant disputed any liability, traversing everything. Each party was in the wrong. The plaintiff succeeded as to his main cause of action to the extent of £1. There were no separate issues. I think if the costs could be discriminated, the Judge could properly have made an order that as to all costs imposed on defendant by the excessive demand (as to which defendant succeeded) the plaintiff should pay such costs: see *Forster's Case* (4). The order, however, was intended to go far beyond this, as the reasons stated on its face show.

None of the authorities where punitive costs were awarded applies. The cause of action was real, though small; the plaintiff succeeded on it; the complaint was not vexatious, or one for which no legal redress was required. In no case cited in Daniell's Ch. Pr., p. 980, or in the Annual Practice, p. 873, is there any case like the present. To describe the action as oppres-

(1) L. R. 6 Eq. 324.
(2) 31 Ch. D. 67.
(3) L. R. 17 Eq. 343.
(4) [1895] 1 Q. B. 564.

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sive or an abuse cannot alter the substantial facts. In cases which could and should have been brought in the County Court, the utmost ever done by Equity Judges was to deprive the plaintiff of High Court costs: Daniell, p. 970, and even this was disapproved of by Sir G. Jessel. The broad rule as to judicial discretion in respect of costs is stated in *Cooper* v. *Whittingham* (1).

The present order is not warranted by any of the cases cited, all of which go on the ground that the action had substantially failed, and ought never to have been brought. None of them relates to choice of forum, but assume that in any Court the plaintiff had no real or just cause of action. The order is erroneous in principle, whether we regard its professed reasons, which may make it difficult to consider subsequent additions or explanations, or whether we look to the facts disclosed in the report. Our costs rules were never designed to alter the settled principles on which judicial discretion (when applicable) was to be exercised. They appear more restrictive than the English rules; they indicate the appropriate punishment for improperly suing in the Superior Court instead of resorting to the County Court. Even under the English code the order would be unsustainable, as the plaintiff won on his main cause of action which, small as it was, was real and not vexatious or imaginary. In *Huxley's Case* (2), the plaintiff was guilty of gross fraud, but, succeeding, he was only deprived of costs. In the whole annals of our law I can find no case where a victorious plaintiff with a real cause of action has been condemned in costs of action as if he had been worsted. In the innumerable actions for dilapidations where small damages have been recovered on a real ground of complaint, who ever heard of a punitive order? It may be desirable to extend judicial discretion so as to cover such facts as we have to deal with here; but that should be done by an explicit general rule.

The learned Judge in making this punitive order was not justified by the materials before him; nor, even if such materials were sufficient, can his exercise of discretion be supported, having regard to the reasons on which he acted. The order was, therefore, appealable.

(1) 15 Ch. D. 501. (2) 14 A. C. 26.

If the order is discharged, what should we substitute? The Court being equally divided, no effective order can be made. If we possess the same jurisdiction and discretionary power as my brother Wright, I would be disposed to order that the plaintiff should, subject to Order LXV., have his costs of the motions and costs of the cause of action on which he succeeded, but that, if and so far as extra costs were caused by the excess of the claim, defendant should have such costs as well as the costs in respect of the count for waste. The case is hardly one for making a complete or partial order of deprivation in respect of costs of action or trial. The defendant improperly denied every traversable allegation, and disputed all liability; there is nothing in the report (though on inquiry the Taxing Master may find something to justify another conclusion) to show that the excess of the pleader's claim for damages caused any substantial increase of costs. The real ground for deprivation would be, not that the action was improperly or oppressively conducted in the Superior Court, but that it should never have been brought there at all. But I doubt whether under our Rules that ground would be legitimate. Instead of denying liability, defendant should have paid a small sum into Court to cover her unquestionable breach of contract. But consideration of the terms of order which the Court should now pronounce is superfluous, as the motion must end in the abortive result of no rule. This I do not regret, as the question is one which should be disposed of by the Court of Appeal.

JOHNSON, J., concurred with GIBSON, J.

LORD O'BRIEN, L.C.J.:—

"The most trivial and insignificant that could possibly be brought," and an abuse of procedure, as this case has been most rightly described by my brother Wright, who tried it, and trumpery, as it has been most justly stigmatised by my brother Boyd, the question arising out of it, which has been presented for our determination, is nevertheless perhaps not altogether destitute of some interest. I say this, in deference to the views of my brothers Johnson and Gibson—for my own part, I think the case might be well disposed of by saying that the learned Judge had materials

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before him upon which he could exercise his discretion, and having exercised it, there was an end of the case—but a feeling of respect for my learned brothers compels me to go further.

This is a question of costs, of costs and nothing more. Costs not infrequently constitute the main, the sole, interest in litigation. Sham actions are the opprobrium of our Courts of Justice, and the amount of costs sought to be recovered in them often, to use an expression of Lord Justice Barry, makes the heart bleed. What is the question here? The question is, can we, ought we to, under the circumstances of the case, review the ruling of the learned Judge at the trial? It is not whether, if we presided at the trial ourselves, we would have made the same ruling, but whether, the Judge who tried the case having made it, we can, we ought to, under all the circumstances, review it. For my own part, I have no hesitation in saying I think the ruling of the learned Judge was correct. I would have made a similar order if I had presided at the trial. The reviewing of the exercise of his discretion by a Judge as to costs, even in a case tried by a jury, has called forth the most vigorous, I would almost say the most indignant, judicial protest of modern times. I refer to what the Lord Chief Justice of England said in the case of *Huxley* v. *West London Extension Railway Co.* (1). It is admitted that there is no case to be found in our Irish law books where the Court, in a case tried by a Judge alone without a jury, reviewed his ruling as to costs alone. This shows at least how cautiously we should proceed. No doubt, under certain conditions, a Judge's ruling as to costs alone can be reviewed: perhaps *Bew* v. *Bew* (2) is the most important case on this subject. Lord Lindley adopted the opinion of James, L.J., in *The City of Manchester* (3):—"Where costs are given with regard to the conduct of the parties, there is no appeal; but where a general rule is laid down and costs given according to it an appeal will lie." In my opinion, my brother Wright did not lay down a general rule in this case, and had not the most distant intention of so doing. The question here appears to me to be one of conduct, having regard to all the circumstances of the particular case; a question of recklessness, oppressiveness, and exorbitance of demand; unjustifiable

(1) 17 Q. B. D. 373. (2) [1899] 2 Ch. 467. (3) 5 P. D. at p. 222.

object, aggravated by abuse of procedure. I say this, lest it should now be thought or hereafter said that I thought there could be under the circumstances any appeal; but my brothers Johnson and Gibson have gone into the case very exhaustively, and perhaps I had better examine it at some length. I concede that if the learned Judge made a mistake in principle, that if there were no materials upon which he could exercise his discretion, that if he did not exercise his discretion judicially, but capriciously or arbitrarily, that his ruling can be reviewed.

What, then, was the character of the action—the course of the trial? What were the facts? I desire at the outset of my judgment to emphasize the fact that the case was not tried before a jury, but that it was a trial before a Judge alone; it was tried by a Judge without a jury.

The provision in the 53rd section of the Judicature Act as to an order for the deprivation of costs is not relevant to the case, and it is not necessary that an order under that section should be made, as the case was not tried before a jury; and to contend that, when such an order is not necessary, we are precluded from looking at the Judge's report (which is even referred to in plaintiff's notice of motion) to ascertain the reasons for his ruling, seems to me to be carrying technicality (if, indeed, I may call it technicality) to an extravagant length, and to be wholly unjustifiable. Indeed, I do not think it at all necessary to go beyond the Registrar's certificate; but what the Judge stated in his report is entirely consistent with what appeared in the Registrar's certificate. What does he say in the Registrar's certificate? Not merely that the action should have been brought in a Civil Bill Court, but that it was quite unfit to be tried in the Superior Court. His words are not merely "unfit" but "quite unfit"—that is to say, "quite unfit" having regard to all the circumstances of the case—this is what my brother Wright most obviously meant. He, the Judge who saw, so to speak, the living picture of the trial before him, ordered that the plaintiff should pay the defendant's costs, less by the damages awarded, and the costs of the Civil Bill Court. For my own part, if I were the Judge at the trial, I would not deduct even civil-bill costs.

It is not denied that there is jurisdiction to make such an order

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if the facts warrant its exercise; indeed, it could not be denied, having regard to the decision in *Harris* v. *Petherick* (1); but it is argued that, in the particular case, the Judge did not exercise his discretion judicially; that in what he did, he acted against and without principle, arbitrarily and capriciously.

What then, I ask again, was the character of the case and trial? The action was one for dilapidation and waste; the plaintiff was beaten as to the waste, and there was a verdict on the other cause of action in his favour for £1 damages. The result as to damages, notwithstanding the elaborate notice of motion, was, and remains, unchallenged. The learned Judge in his report, which is referred to in the plaintiff's notice of motion, after stating that the action was the most trivial and insignificant that could possibly be brought, and should never have been commenced by a writ in the Superior Courts, states—I give his very words—"The plaintiff's own estimate of his loss on all claims was only £5 to £6, and this figure was, in my opinion, greatly exaggerated." That is to say, the action having been brought for £30, the plaintiff when he came into Court abandoned four-fifths of his claim; and as to the remaining one-fifth, he was wrong as to five-sixths of it; he was wrong as to the balance, to the extent of £5 out of £6. Upon the whole case, out of the £30 which he claimed, he was right only as to £1. What does this show? That he made an exorbitant claim of £30, through recklessness or from sinister motives. This is the very ground which is laid down as constituting good cause for making what is styled an exceptional rule as to costs: "If the facts show that there has been misconduct on the part of the plaintiff to this extent that the fact of bringing the action is oppressive, or that he has made an exorbitant claim through carelessness or recklessness, this would be good cause for the Judge's interference" (see Lord Brampton's judgment in *Robert* v. *Jones* (2), where he refers to the opinions of Sir George Jessel and Lord Esher). I repeat the words, "or that he has made an exorbitant claim through carelessness or recklessness." This expression, as applied to the present case, is the low-water mark of characterisation. Lord Brampton also referred, on the same

(1) 4 Q. B. D. 611 (2) [1891] 2 Q. B. 194, at p. 196.

page of the report, to what Lord Bowen said in *Jones* v. *Curling* (1) as to what constitutes "good cause:"—"Good cause," said Lord Bowen, "really seems to me to mean that there must exist facts which might reasonably lead the Judge to think that the rule of the costs following the event would not produce justice as complete as the exceptional order which he himself could make. Now to ascertain the existence of such facts, the Judge should look, in the first place, at the result of the action itself, namely, the verdict of the jury, and he should also look at the conduct of the parties, to see whether either of them had involved the other unnecessarily in the expense of litigation; and beyond that he should consider all the facts of the case, so far as no particular fact was concluded by the verdict of the jury." Tried by this test, I think the ruling of the learned Judge was right.

Almost every Judge who has dealt with this subject refers to the importance of the fact that the Judge at the trial sees and hears the witness; and it strikes me it would have been important to have seen and heard the witness when having abandoned four-fifths of his claim he was struggling to maintain the balance of £6. Was it not open to the learned Judge at the trial to say—was it capricious or arbitrary on his part to think—that the action was recklessly and oppressively instituted, and that the most that could be said in plaintiff's favour was that he should be allowed his damages and civil-bill costs? But I return again to what the learned Judge did say. He said that the action was the most trivial and insignificant that could possibly be brought, and that it should never have been commenced by writ in the Superior Courts, and then he refers to the cardinal circumstance of the plaintiff's own estimate of his loss, abandoning four-fifths of his claim, and grossly exaggerating as to the remainder. He says then it was wrong, and an abuse, to bring such an action in the Superior Courts—that is to say, an action characterised not merely by gross exaggeration as to the amount claimed, but by recklessness in putting forward a claim for that amount.

The learned Judge plainly did not refer merely to the amount recovered, but took into consideration all the circumstances of the

(1) 13 Q. B. D. 262.

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case. Might not the learned Judge reasonably think that the bringing of this action in the Superior Courts was an oppressive assertion of a legal right; that its true object was not to enforce a trivial liability, but to make costs? Was it not reasonably open to the learned Judge to think that the action was unjust and unscrupulous, and not merely the *bona fide* assertion of an exaggerated claim? (See observation of Hawkins, J., in *Willey* v. *Great Northern Railway Co.* (1)). What hope would there be of a settlement, in a case like this, when an amount so large was claimed, and claimed by a writ in the Superior Courts? Was it at all likely that a reasonable tender or offer would avail? What would that embodiment of commonsense and of rough but true justice, "the man in the street," have said to the bringing of such an action, under all its circumstances, in the Superior Courts? If he did not apply to such a proceeding the language of the streets—and wayside expletives are much to be deprecated—it appears to me that he would be fully justified in saying that it was cruelly oppressive. But putting aside the man in the street, who is not trained in the ways of the law, and knows nothing about the costs sections of the Common Law Procedure Act, or the 53rd section of the Judicature Act, or of the nature and exercise of what is called judicial discretion, I think the Judge who tried the case would be amply justified in saying that the bringing of this action, such as it was, in all its circumstances, in the Superior Courts was cruelly oppressive; that it was wrong, and an abuse, and quite unfit to be tried in the Superior Courts.

Let me turn again to some of the authorities. In *O'Connor* v. *Star Newspaper Co.* (2), a case tried before a jury, and where there was no statement at all of his reasons by the Judge who tried it, when the matter came up for review, Lord Esher is reported to have said:—"The question is whether we think that the bringing of this action was the oppressive assertion of a legal right." Bowen, L.J., thought that the smallness of damages might, *per se*, be "good cause," even in a case of libel, for the deprivation of costs. True, Smith, L.J., said in the same case, agreeing apparently with Lord Esher, that good cause must be something more than the mere

(1) [1891] 2 Q. B. at p. 207. (2) 68 L. T. (N. S.) 146.

smallness of damage—the smallness of damage is, however, he said, an important element to be considered if there are other circumstances which can be considered. In this case I respectfully protest against the assertion that my brother Wright took into consideration merely the smallness of the damages. It would, in my opinion, be absurd to lay down as a general rule that smallness of damage was always to determine the matter. Why? Mere nominal damages only are often given in the most complicated cases, involving some important principle or right to property; cases eminently, perhaps exclusively, fit to be tried in the Superior Courts. Here, most obviously, the learned Judge exercised his discretion upon all the facts and circumstances of the case; and it appears to me a strong proposition to contend that there were no facts or circumstances, no materials, upon which he could exercise his discretion. It appears to me that if we review the learned Judge's exercise of discretion on the ground merely of the *extent* to which it was exercised, once there are materials for its exercise, we would be substituting our own idiosyncrasy for that of the Judge. In fact, we would be confounding "degree" with "principle." Not that I think, however, the Judge's ruling cannot be reviewed if he has, in the extravagant lengths to which he has gone, plainly abused his discretion. Now, one Judge may consider that a given set of materials may justify him in merely depriving a plaintiff of costs, and another Judge may think the same set of materials would justify him in making the plaintiff pay the defendant's costs. This is a question of degree, the hypothesis being that there are materials for the exercise of discretion. However, I admit, as I have said, that if the Judge at the trial went to such a very extravagant length as to show that he manifestly abused his discretion, his ruling in that case could be reviewed.

In dealing with this subject, A. L. Smith, L.J., says that if there be any evidence of good cause, then the matter is one for the discretion of the Judge, and this Court cannot review the exercise of his discretion: *Bostock's Case* (1). Is there not evidence of good cause here? Is there not evidence of recklessness,

(1) [1900] 2 Q. B. 616, at p. 621.

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of oppressiveness, of exorbitance of demand, of oppressive and unscrupulous selection of tribunal for the purpose of making costs? But let me turn to the case of *Forster* v. *Farquhar* (1). Lord Bowen said in that case—"No clearer and no closer definition can be given than that there will be good cause whenever it is fair and just, as between the parties, that it shall be so. . . . Against any attempt on the part of any Court to impose, by definition or otherwise, a fetter on the discretion which the law has left to a Judge in any particular case this Court has always protested. It would be far too narrow a view were we to hold that 'good cause' only exists where there has been misconduct, oppression, or injustice on the part of the successful party. No such limitation is to be found in the rule, and, as a matter of reason, it is clear that a successful litigant need not have been guilty of injustice or oppression to make it unfair that he should cast on his opponent all the costs of the litigation. The measure of what is fair as to costs is not to be found in a mere consideration of his conduct towards the opposite side. It may have been reasonable from his point of view to do that which it would be unreasonable to make the opposite litigant pay for. Although he has won the action, he may have succeeded only upon a portion of his claim under circumstances which make it more reasonable that he should bear the expense of litigating the remainder than that it should fall on his opponent. The point is not merely whether the litigant has been oppressive in the way he waged his suit or prosecuted his defence, but whether it would be just to make the other side pay. We can get no nearer to a perfect test than the inquiry whether it would be more fair, as between the parties, that some exception should be made in the special instance to the rule that costs should follow upon success."

What, then, was just and fair in this case? What might the Judge at the trial reasonably think fair and just? That as the plaintiff had selected his tribunal oppressively for the trial of an exorbitant claim, recklessly put forward, it was only fair and just that he should pay for having done so, and that the just measure of what he should pay was the payment of

(1) [1893] 1 Q. B. 564.

the defendant's costs, *minus* the damages recovered, and civil bill costs: or the learned Judge might, with great reason, say that the plaintiff oppressively selected his tribunal, not for the *bonâ fide* purpose of enforcing what he believed to be an honest claim, but that he selected it oppressively and unscrupulously in order to put forward an exorbitant demand for extorting a greater sum than was due to him, and for the purpose of getting costs; if the learned Judge thought so, the course taken was certainly wrong, and an abuse, and the case was most unfit to be tried in the Superior Courts, and the Judge's ruling, as to costs, was not merely correct, but, in my opinion, ideally so.

Here I may say a word about *Lyons* v. *Peacock* (1). That was a case where the Court declined to exercise its own discretion as to the deprivation of costs; it was not a case of reviewing another Judge's ruling. In that case it appears from the argument of counsel that there were cross-claims—a *bonâ fide* contest as to payment all along the line of battle, not an immediate surrender, as in this case, of four-fifths of the claim, showing at least utter recklessness as to the amount claimed. The cross-demands showed that the case was fit for consideration in the Master's office. It was apparently a case fought out at length in the Master's office, and not a case tried before a Judge alone. The Court left the costs to be regulated by the 97th section of the Common Law Procedure Act, 1856, which *Lapsley* v. *Blee* (2) had decided not to have been repealed by the Judicature Act. In that case, and in *Lyons* v. *Peacock* (1), there was no "trial" within the meaning of the 97th section of the Common Law Procedure Act, 1856. Here there was a trial by a Judge alone.

It is said that here, in the case before us, there was a real cause of action because the plaintiff recovered £1 on what was styled his main cause of action. I know the case is to be dealt with on the basis that the plaintiff was entitled to recover £1. But how far is this doctrine to apply? Suppose an action is brought for £1000 for dilapidation, and £1 is recovered. What then? It seems to me that, though the plaintiff was entitled to recover in this case £1, he had, looking at the claim made, no substantial

(1) 12 L. R. Ir. 148. (2) 6 L. R. Ir. 155.

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foundation for it. See what Lord Bowen said in *Florence* v. *Mallinson* (1). It was said that in this case the defendant ought to have paid money into Court instead of putting traverses on the file. He was justified in putting traverses as regards the count on waste; and as regards the other count, the traverses were of the most formal character. The case was a mere assessment of damages, no principle or right being involved. It would, indeed, be very hard for the defendant to measure what to pay into Court. The extravagant sum of £30 was claimed, and the case was one for unliquidated damages. If the damages were liquidated, it might be a different matter. No such point was made in *Harris* v. *Petherick* (2), where the sum recovered was of a liquidated character; nor do I find that such a point was made in *Florence* v. *Mallinson* (1). However, I admit that in some cases the fact that money was not paid into Court may be taken into consideration. Here the non-payment of money into Court could not show that the institution of the action in the Superior Court was not oppressive—I would say cruel and oppressive.

I now turn to the case of *Wilson* v. *M'Mains* (3), which is supposed to have a very important bearing in favour of the plaintiff. That case is plainly distinguishable. It was a case tried before a jury, and it was held by the Court that there was no "special cause" to satisfy the proviso in the 53rd section of the Judicature Act. It was, besides, an action for seduction, the presence of which, having regard to the exception as to costs in Common Law Procedure Act, is specially favoured in the Superior Courts. Fitz Gibbon, L.J., is reported to have said in that case:—"The judgment below, so far as reported to us, seems to me to have erred in not sufficiently regarding the difference between the Irish and English Law on the subject of costs of jury trials. Mr. Justice O'Brien appears to have relied on *Garnett* v. *Bradley* (4), but the limits placed by our Judicature Act, section 53, upon judicial discretion as to these costs make that authority inapplicable here. In Ireland the Judge who directs that the costs of a jury trial shall not follow the event, must not only have 'special cause,' but must also mention it on the face of his order, for the very purpose of

(1) 65 L. T. (N. S.) 354.
(2) 4 Q. B. D. 611.
(3) 20 L. R. Ir. 582, 590.
(4) 3 A. C. 944.

enabling the Divisional Court to review his discretion, and to discharge or vary his order, if not found to rest on what is legally recognizable as 'special cause.' The strong language used by the Lord Chief Justice of England (see *Huxley* v. *West London Extension Railway Company* (1)) in, as he says, striving to preserve the unfettered discretion which, in his opinion, was given him by Parliament, could not be addressed to us in this country, as here, by statute, a controlling discretion exists, and the Judge at the trial has been required to furnish on the face of his order the materials for its exercise. In *Jones* v. *Curling* (2), Lord Esher points out that 'special cause' must be something independent of the result of the action, for the costs must follow the event unless 'special cause' exists. It therefore must be something that does not exist in every case. Again, the mere fact that the verdict was for £10 cannot be 'special cause,' for if it were, in every case, though the verdict was over the statutory limit for carrying costs in the Superior Court, if it was within the jurisdiction of the Civil Bill Court, the plaintiff should be deprived of his costs. This is, in my opinion, a stronger case; for, though the verdict is within the civil-bill jurisdiction, there is no statutory limit to the amount of damages for seduction which carries costs in the Superior Court. According to the existing law this verdict *primâ facie* carries full costs, and *primâ facie* the plaintiff was justified in bringing his action; and the mere smallness of the amount recovered is not in itself 'special cause.'" It is quite plain, having regard to what Fitz Gibbon, L.J., said, that this case is obviously distinguishable from *Wilson* v. *M'Mains* (3). I now turn to what Barry, L.J., said—[His Lordship read the judgment of Barry, L.J. (4)].

It will be perceived that all this was referable to the character of the action, one of seduction, and to the distinctive language of the Irish statute in relation to a trial before a jury. The learned Lord Justice said that he was not depriving a poor man of his right to select his own tribunal. I desire to point out that what my brother Wright did in this case in no way conflicts with the statement of the learned Lord Justice. Every man can honestly,

(1) 17 Q. B. D. 373.
(2) 13 Q. B. D. 262.
(3) 20 L. R. Ir. 582.
(4) *Ibid.* pp. 597–599.

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and without sinister object, select his own tribunal. The learned Lord Justice is also reported to have said, in the passage which I have read, "In this case it appears to me that if we considered the special cause appearing on the face of the order sufficient to deprive the plaintiff of his costs, we could not stop short of laying down that wherever the parties are poor and the sum recovered is within the civil-bill jurisdiction, and the Judge who tries the case thinks that more could not reasonably be recovered—in every such case the plaintiff should lose his costs. I am not prepared to lay down that general rule." This is the language of Lord Justice Barry, and however true it may be as a general proposition, it has, in my opinion, no application to this case. There was no question of the poverty of the plaintiff in this case; it is not referred to in the learned Judge's reasons, as it was in the Judge's reasons in *Wilson* v. *M'Mains* (1). My brother Wright exercised his discretion, having regard to the course of the trial, and all the facts of this case. I respectfully concur in the judgment of the Court of Appeal in *Wilson* v. *M'Mains* (1). I cannot see what misconduct, or recklessness, or oppression, there was on the plaintiff's part in that case, or what abuse there was of a legal right to sue. Certainly the daughter did not, previously to the trial, tell her father, the plaintiff, of the immediate character of her surrender, nor did it appear what degree of force was brought to bear to effect her fall. Women do not, in any country, as a general rule at least, make their fathers their confidants as to the extent of their moral delinquencies. I think also that sexual cases—cases in which the passions are involved—are eminently for a jury. Having regard to the reasons which operated on the minds of the Lord Chancellor, Fitz Gibbon, L.J., and Barry, L.J., I refer to the case of *Wilson* v. *M'Mains* (1) as in no way derogating from, but to some extent at least, having regard to the distinctive reasons upon which it was founded, as tending to support, the view I have taken. Though I do not agree with the result arrived at by O'Brien, J., in *Wilson* v. *M'Mains* (1), there is a passage in his judgment which I think relevant to the

(1) 20 L. R. Ir. 582.

present case. Discussing the effect of the costs section of the Common Law Procedure Act, he is reported to have said (p. 587), "They [the Common Law Procedure Acts] say that a person shall not have any costs unless he recovers so much in contract or tort, not that he shall have them if he do recover that amount. If the policy of the Judicature Act was to give to the Judge a power of the same kind as to the Court, though subject to question, it undoubtedly must be taken to leave in him some sphere of discretion—some scope for individual opinion. At all events, if the reasons stated by him are, in their own nature, fit to influence his mind, the judgment as to the degree and force of these reasons must be absolutely for himself." The costs sections of the Common Law Procedure Acts provide that, having regard to the amount recovered, and to the place of residence of the parties, the plaintiff may recover no costs or half costs, as the case may be; but those sections do not show that the plaintiff shall not be ordered to pay costs when his conduct is reckless, unscrupulous, and oppressive; such a case can be dealt with by the 53rd section of the Judicature Act, and never was there a more wholesome jurisdiction conferred.

I now turn to the case of *Harris* v. *Petherick* (1). I am, of course, aware that the only sum that was recovered in that case was the sum of six shillings, costs of advertisement for the sale of a horse; but I refer to that case to illustrate the character and extent of jurisdiction. In that case, which was a jury trial, the plaintiff was ordered, not only to pay the defendant's costs of the trial, but the costs of the non-suit which had previously been directed—and the language of the Judges is to be noted.

Bramwell, L.J., said—"Upon the words of the first portion of Order LV., I am strongly of opinion that it is within the power of the Court, although the plaintiff has succeeded to some extent, to compel him to pay the defendant's costs as well as his own; it appears to me clear that, where the action has been tried without a jury, the circumstance that the plaintiff has recovered something will not of itself relieve him from liability to pay the defendant's costs. The proviso at the end of the order

(1) 4 Q. B. D. 611.

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does not take away that power; the only difference is that if the action is tried before a jury, it is requisite that "good cause" be shown; but when that has been done, the Judge or Court has the same absolute discretion as if the action had been tried without a jury. Therefore, I hold that a Judge has power to direct that a plaintiff shall pay the costs of the action, although he obtains judgment for a small amount."

Nothing could be plainer than this—and see what was said of this decision by Lord Lindley and Lord Bowen in *Florence* v. *Mallinson* (1). Lindley, L.J., says (p. 358), "I would add, on the point as to the costs, that it was settled conclusively by *Harris* v. *Petherick* (2) that a Judge has power to order a plaintiff who recovers a nominal sum to pay the defendant's costs. Therefore, it cannot be said because the plaintiff gets 40*s.* damages he is entitled to the costs of the action."

Bowen, L.J., says (p. 359), "Passing to the question of structural damage, Kekewich, J., thought on the balance of the evidence that there had been negligence without substantial damage. The Court has power to order a plaintiff who recovers a nominal sum to pay the defendant's costs: *Harris* v. *Petherick* (2). Kekewich, J., saw the witness, and came to the conclusion that the claim in respect of injury to the plaintiff's building had *no substantial foundation*. On the whole, I think, therefore, that the appeal ought to be dismissed with costs."

We have then this power—this jurisdiction—to make the plaintiff pay the defendant's costs recognized by Manisty, J., who tried *Harris* v. *Petherick* (2), and by Mellor, J., and Cockburn, J., and by Lord Bramwell, Lord Esher, and Lord Justice Cotton, and by Lord Lindley and Lord Bowen—a host of distinguished Judges. It is also recognized by Lord Brampton in *Roberts* v. *Jones* (3). In an important passage in his judgment in that case he says (pp. 203, 204), "I cannot help thinking that Order LXV. was intended, among other things, to give the Judge power to check such abuse. I am not without warrant and authority for saying that the fact that costs are legally incurred by no means proves they are

(1) 65 L. T. (N. S.) 354. (2) 4 Q. B. D. 611. (3) [1891] 2 Q. B. 194.

not oppressive and unjust. Legality and oppression are not unknown to run hand in hand. A man may legally sue in any Court he pleases, but the Legislature has long since recognized the impropriety of a plaintiff suing in a Supreme Court in respect of a cause of action which, having regard to the damages or sum sought to be recovered, ought in reason to be brought in a less expensive one, viz., a County Court, by depriving him of all costs unless the Judge who tries the action otherwise directs, and by allowing in certain cases costs only on a lower scale if the action could have been brought in a County Court. Thus a plaintiff imperils his costs if he abuses his privilege to sue unnecessarily in a Supreme Court. Why not also if he abuses his privilege in his selection of the place of trial? In *Collins* v. *Welch* (1), which was an action of tort for negligence occasioning personal injuries, the jury found for the plaintiff, damages £12, and that the claim was *bonâ fide*. Both the Judge (Denman, J.) and the jury thought the action, though legally brought in a Superior Court, ought, in reason, to have been brought in the County Court, and the Judge treated that as good cause for wholly depriving the plaintiff of his costs. This order was upheld by the Divisional Court, and also in the Court of Appeal. It is true the final decision turned upon another point, but the goodness of the cause was not even questioned. In *Jones* v. *Curling* (2) this case was referred to by Brett, M.R., without questioning its correctness. Cases are also to be found in which the plaintiff has been exercising his legal right to sue, and has recovered—he has not only been deprived of costs, but also ordered to pay the costs of the defendant, although the defendant, by the verdict, was shown to be legally wrong. See *Williams* v. *Ward* (3), also *Harris* v. *Petherick* (4), where the claim being for £85 6*s*. the plaintiff recovered 6*s*. only. He was ordered to pay the costs of the trial. See also *Barnes* v. *Maltby* (5), where in an action for defamation the plaintiff was deprived of his costs, even though he recovered £5 beyond a sum of £10 which the defendant had paid into Court. These cases show that a plaintiff,

(1) 5 C. P. D. 27 (C. A.).
(2) 13 Q. B. D. 262.
(3) 55 L. J., Q. B. 566.
(4) 4 Q. B. D. 611.
(5) 5 *Times* L. R. 207.

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though he may have simply pursued his legal right to sue, may nevertheless be not only deprived of his own costs, but ordered to pay the costs of the defendant who was legally wrong, if the plaintiff's conduct before or in the course of the litigation has been vexatious and oppressive."

Now, then, if the jurisdiction is undoubted, why should we be examining a bead-roll of cases in equity, where the decision rested on different states of fact? This is a method without principle, a mere comparison of idiosyncrasies not resting on the same state of facts, but on different states of fact—a very precarious method indeed. My brothers Johnson and Gibson seem to think that, apart from the Judge's reasons, they could mould the order for costs according to their own views. If I could do this (and I do not want in any way to depart from the Judge's reasons, from what was plainly passing in his mind), I would, judging of the case for myself, make the same order as he did—except, perhaps, that I would not deduct even the very small civil-bill costs.

On the whole, I think it is not competent for us, under all the circumstances of the particular case, to review the learned Judge's ruling.

J. G. T.

Appeal. Feb. 16, 19, 27.

The plaintiff appealed to the Court of Appeal (Palles, C.B., and Fitz Gibbon and Holmes, L.JJ.).

Hanbury Geoghegan, for the appellant.

Ignatius J. O'Brien, K.C., and *William M'Grath*, for the respondent.

The arguments were the same as in the King's Bench Division.

Feb. 27.

PALLES, C.B.:—

There is only one question open to us in this case, namely, whether the King's Bench Division had jurisdiction to entertain an appeal from the order of Wright, J. If it had not, the order

under appeal cannot stand. Section 52 of the Judicature Act (Ireland), 1877, enacts that "No order made by the High Court of Justice, or any Judge thereof, . . . as to costs only, being costs which, by law, are left to the discretion of the Court, shall be subject to any appeal unless by leave of the Court or Judge making such order." The following section (section 53) contains a proviso, to which I shall refer later on, with regard to the costs of every action, question, and issue tried by a jury; but as this action was tried by a Judge without a jury, that proviso does not apply. *Primâ facie* the order of Wright, J., comes under sect. 52, and as leave to appeal has not been given, the appeal to the King's Bench Division could not lie unless the facts of the case are such as to rebut that *primâ facie* inference.

Owing to the Judges in the King's Bench Division being divided on this question, I feel bound, out of respect to that Court, to give in detail the reasoning upon which I base my conclusion. It is convenient that I should, in the first place, express my view of sect. 53 of the Irish Judicature Act, 1877. The first consideration in interpreting that section is the state of the law as it existed at the passing of the Act as to costs in the two Courts which it was the main object of the Act to unite, and the extent to which it was necessary to alter that then existing law.

Before the passing of the Act the law as to costs at Common Law and in Chancery differed entirely. At Common Law costs were the creation of statute. Lord Hatherley says, in *Garnett* v. *Bradley* (1) :—"In the matter of costs the Courts of Common Law had no discretion, such as the Courts of Chancery had at all times asserted. The Common Law Courts were obliged to go back to a legislative enactment in order to arrive at their power, or rather their duty, for power they had none, of dealing with costs. The Statute of Gloucester (6 Edw. 1) is the foundation of the Common Law jurisdiction as to costs, and that statute bound the Common Law Judges so that they could not in any way depart from the rule which was laid down, that costs followed the event."

The Statute of Gloucester gave a successful plaintiff his costs, and a later Act gave a similar right to a successful defendant; but both statutes so bound the Judges as to leave them no discre-

(1) 3 A. C. 944, at p. 953.

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tion. After these statutes, many other Acts were passed which created exceptions to this general rule in particular classes of cases, in relation to which certain particular facts existed. Under the earlier statutes, in cases in which the general rule was departed from, the state of facts, by reason of which the exception existed, had to be suggested on the record, and, unless admitted, should have been found by a jury; and the absence of such a suggestion or finding might be ground of error: *Walton* v. *Quilter* (1). In later statutes the Judge at the trial was substituted for a jury as the tribunal to determine the existence of the exceptional state of facts, and thus the matter was excluded from the cognizance of a court of error: *Scott* v. *Bennett* (2). Costs in the Court of Chancery, on the other hand, were always in the discretion of the Court, regulated, no doubt, by *quasi*-general rules, resulting from the decisions and practice of centuries, but subject to appeal only in certain exceptional cases. To this rule there was one exception: there was no jurisdiction in Chancery to order a successful defendant to pay all the costs of proceedings. *Tidwell* v. *Ariel* (3), *Cooth* v. *Jackson* (4), and the reasoning in the judgments in *Foster* v. *Great Western Railway Co.* (5) establish this. This rule did not, however, extend to a successful plaintiff, who not only was frequently denied his costs, but in many classes of suits, such, *ex. gr.*, as those to perpetuate testimony, was, as a rule, ordered to pay costs. Further, in all cases the conduct of a party might be, and was, taken into consideration in determining questions of costs, and a departure from practice did not affect jurisdiction. The reason for this is given by Lord Hardwicke in *Owen* v. *Griffiths* (6): —"The foundation of it" (the rule that there was no appeal on the question of costs) "was to prevent vexation and trouble, for as cases in equity often depend on abundance of circumstances about which the reason of mankind might differ, it would create perpetual appeals." This decision was followed by Lord Thurlow in *Wirdman* v. *Kent* (7).

There being this difference between the jurisdiction of the two

(1) 11 M. & W. 760.
(2) L. R. 5 H. L. 234-245.
(3) 3 Madd. 409.
(4) 6 Ves. 41.
(5) 8 Q. B. D. 515.
(6) 1 Ves. Sen. 249.
(7) 1 Brown's Ch. Cases, 140.

Courts upon questions of costs, a new rule had to be framed to fit the new and single jurisdiction which was brought into being by the Judicature Act. That jurisdiction could not thenceforth depend upon the law which had theretofore prevailed in either Court, because there was to be but one Court, nor upon the Division of that one Court in which the action was brought, because the particular Division in which any action was to be brought was by the Act made a matter, not of jurisdiction, but of practice. What, then, was the new rule established by the Legislature? It seems to me to be so transparently clear as to be free from any possible doubt. In the first place, the Act preserves the old rule as to costs in certain classes of cases enumerated in section 53, viz. those of a trustee, mortgagee, or other person having a right to costs out of a particular estate or fund. All other legislative enactments regulating costs, save those limiting the plaintiff's costs, which are not in point here, are repealed: *Garnett* v. *Bradley* (1); and one new jurisdiction created, in plain words, is—"Subject to . . . the provisions of Rules of Court, . . . the costs of and incident to every proceeding . . . shall be in the discretion of the Court. Provided that," subject to an exception not necessary to be mentioned here, "the costs of every action, question, and issue tried by a jury shall follow the event, unless, upon application made, the Judge at the trial, or the Court, shall, for special cause shown and mentioned in the order, otherwise direct; and any order of a Judge as to costs may be discharged or varied by a Divisional Court." Thus, the present jurisdiction as to costs extends to two separate classes of cases, and it varies according as it applies to one or the other. First, there is that class which comes under the old Chancery rule, and which now includes all cases tried by a Judge without a jury, whether the jurisdiction as to them was, before the Act, at Common Law or in Chancery. In cases within this class the costs are in the discretion of the Judge. The second class consists of cases tried by juries. In this second class the jurisdiction is altogether new. "Special cause shown and mentioned" is a condition precedent to depriving a plaintiff of costs to which, before the Act, he would have been entitled; but inasmuch as the Judge has in certain cases a discretion, it is not correct to say

(1) 3 A. C. at p. 956.

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that jury cases now come under the old Common Law rule, that costs follow the event. In cases tried by juries the Legislature took a middle course, and the limitation imposed upon the discretion of the Judge in such cases shows that the Legislature knew well how to limit jurisdiction when it desired to do so. The contrast between cases of the first and second class is striking. The jurisdiction as to costs in cases of the first class is untrammelled. It is true that the discretion is judicial, and not arbitrary; but the jurisdiction, when not exceeded, is absolute, and allows a Judge to deprive a successful plaintiff of his costs (*Dicks* v. *Yates* (1)). The jurisdiction is to be exercised, not upon "special cause," but upon all the circumstances of the case. The Legislature possibly expected that the Judges would follow the old Chancery practice as to costs, but it does not bind them to do so, nor attempt to limit a new jurisdiction, which required such a freedom in its exercise as to be incompatible with a right to appeal. All this appears to me to be so clear as to render it unnecessary to refer to authorities. As, however, many of them are cited and commented upon in the judgments in the King's Bench, it is not right that I should pass them by wholly without notice. *Dicks* v. *Yates* (1) and *Florence* v. *Mallinson* (2) rule the present case. In *Dicks* v. *Yates* (1) James, L.J., says:—"There is this essential difference between a plaintiff and a defendant. A plaintiff may succeed in getting a decree and still have to pay all the costs of the action; but a defendant is dragged into Court, and cannot be made to pay the whole costs of the action if the plaintiff had no title to bring him there." In *Florence* v. *Mallinson* (2) the Court of Appeal explained the judgment of Jessel, M.R., in *Cooper* v. *Whittingham* (3). Lindley, L.J., says—"All that I can say is that, if the Court" (*i.e.* Jessel, M.R.) "intended in that case to lay down what is contended on behalf of the appellant here, the judgment is to that extent erroneous. I do not, however, understand Sir G. Jessel to say anything of the kind." The judgment of Bowen, L.J., is to the same effect, and both Lord Justices follow *Harris* v. *Petherick* (4)—a case stronger than the present, as there it was held that a Judge has power to order a plaintiff who recovers a

(1) 18 Ch. D. 76.
(2) 65 L. T. (N. S.) 354.
(3) 15 Ch. D. 501.
(4) 4 Q. B. D. 611.

nominal sum, not merely to bear his own costs, but to pay those of the defendant. The order in *M'Gregor* v. *Clay* (1) was to the same effect. That was a case tried by a jury, and the fact that the action was a frivolous and vexatious one was held to be "good cause" for depriving the successful plaintiff of his costs. *Gauls* v. *Bonner* (2) is another case of the same kind. I do not refer to the details of these cases, as to do so would lead to confusion. The question before us relates to the existence, not to the exercise, of the Judge's jurisdiction, and its existence here depends on the fact that the case was tried without a jury.

Next arises the subsidiary question, whether the Judge, in exercising his discretion, took into consideration an element which he was not entitled to consider. If he did so, then I would agree with Gibson and Johnson, JJ., that his decision was reviewable. The decision of Kekewich, J., in *King* v. *Gillard* (3) was reversed because one of the grounds on which he stated that he had exercised it was one which the Court of Appeal held not to be open to him; and the ground of reversal of the order of Bigham, J., in *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (4) was that there were no materials upon which he could exercise his discretion by making the order. But were we to hold, as we are now asked to do, that the smallness of the amount recovered by the plaintiff is not, in this case, a legitimate ground for ordering him to bear his own costs, we would have to hold that such a consideration could never be legitimate. For three centuries trifling and vexatious actions have been discouraged by the Legislature, and the same principle was approved by the Judicature Act, which extended it to cases of libel in which only 40*s.* damages were recovered. The Process and Practice Act, 1850, sect. 45 (5), the Common Law Procedure Act, 1853, sect. 126 (6), and the Common Law Procedure Act, 1856, sect. 97 (7), are based upon this principle. In *Simmons* v. *M'Adam* (8) Malins, V.-C., held that the fact that the action could have been brought in the County Court was a good ground for allowing the plaintiff only such costs

(1) 4 *Times* L. R. 715.
(2) 54 L. J. Ch. (N. S.) 517.
(3) [1905] 2 Ch. 7.
(4) [1903] 2 Q. B. 756.
(5) 13 Vict. c. 18.
(6) 16 & 17 Vict. c. 113.
(7) 19 & 20 Vict. c. 102.
(8) L. R. 6 Eq. 324.

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as he could have recovered there. Had both parties in the present case chanced to reside in Kingstown, the plaintiff, even had the case been tried by a jury, under Order LXV., Rule 4, could not have recovered any costs without a certificate from the Judge.

The fitness of the forum selected is always a good ground for the exercise of a Judge's discretion as to costs. *Lyons* v. *Peacock* (1) and *Kay* v. *Tighe* (2) are Irish decisions on the point before us, and have never been disapproved of. For these reasons I am of opinion that the order appealed from should be reversed.

FITZ GIBBON, L.J.:—

I desire to avoid, as far as possible, travelling again over ground covered by the judgment of the Lord Chief Baron. But, having regard to the importance of the case, and to the difference of opinion in the King's Bench, I feel it my duty to state the principles on which I have reached the same conclusion; and to refer particularly to a very few of the cases which appear to me fully to support it.

The jurisdiction and duty of the appellate Court seem to me to be quite different in the cases of issues found by a jury, and where leave to appeal has been given, from what they are in other cases where the costs are by statute declared to be in the discretion of a Court or Judge of first instance.

By positive law, the costs of every action, question, and issue tried by a jury must follow the event, unless, upon application made, the Judge at the trial, or the Court, shall, for special cause shown and mentioned in the order, otherwise direct; and any order of a Judge as to such costs may be discharged or varied by a Divisional Court, and in such cases an appeal lies to this Court. I hold that this enactment has the effect of submitting the incidence of the costs, in the cases to which it applies, to the discretion of three successive tribunals, before the *prima facie* right of the successful party to have his costs can be finally displaced. Further, I hold that this *prima facie* right is not merely a right to have the costs, but also a right to retain them, if there is an appeal, until each successive tribunal, *exercising its own judicial discretion*, has decided otherwise.

(1) 12 L. R. Ir. 148. (2) 18 L. R. Ir. 40.

Speaking for myself, as at present advised, I should hold that the subjection of the discretion of the Court of first instance to review involves a rehearing, and a reconsideration by the appellate tribunal of the sufficiency of the grounds for depriving the successful party of his *prima facie* right; also involves the substitution, at each step, of the discretion of the superior tribunal for that of the Court below as the deciding authority upon the question, not whether the lower tribunal *might* or *could*, but whether it *should* or *ought* to displace the statutory incidence of the costs.

Similarly, when leave is given to appeal from an order as to costs, I should hold that the giving of such leave implies an intention that the discretion of the superior tribunal shall be substituted for the discretion upon which the primary order was made.

It is immaterial, for my present purpose, to consider the cases governed by specific statutory rules, such as those in which costs in equity are, by practice, payable out of a particular fund, or those in which the amount of costs is limited; but the Chief Baron has fully referred to the importance of those cases as illustrating the vital distinction between the appellate jurisdiction in such cases and the jurisdiction in cases where the incidence of costs is unconditionally left to the discretion of the Court of first instance. This case belongs to the latter class, and, in my opinion, it has been long since conclusively settled that, in this class of cases, there is no jurisdiction to review the exercise of the discretion of the primary tribunal, except under very well-defined and peculiar circumstances, which do not exist here.

As at present advised, I am prepared to hold that review of an order purporting to be made in the exercise of a Judge's discretion as to costs in such a case as this is *ultra vires* of any appellate tribunal, unless it is shown either—(*a*) that the Judge has not exercised a judicial discretion at all—*i.e.* that he has acted arbitrarily, capriciously, or recklessly—a case which is hardly conceivable; or (*b*) that he has acted upon *wrong* grounds—*i.e.* that he has based his decision upon grounds which the law does not recognize; or (*c*) that there is *no evidence* of the existence of any lawful ground for his decision.

I am inclined to think that this last ground is only the first in another form—that it is tantamount to saying of the Judge's

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decision, as may be sometimes said of the verdict of a jury, that it is "*perverse.*" But I prefer to treat it as a separate ground, and so treating it, the appellate tribunal can, in my opinion, set aside a discretionary order as to costs only where there is such a total absence of evidence to sustain the order as would warrant a Court in setting aside the verdict of a jury as being "*against evidence,*" as distinguished from being merely "*against the weight of evidence.*" I hold that there is no jurisdiction to review a discretionary order as to costs merely on the ground that it is against the weight of evidence. The admission of such a jurisdiction would be the negation of the positive law that no appeal shall lie from any order made by a Judge in the exercise of his discretion as to costs, without leave, where there is no special statutory provision as to the incidence or amount of those costs.

Wright, J., has stated the grounds on which he made his order in the present case, namely—that the action ought not to have been brought in the High Court, and that, being so brought, it was oppressive, wrong, and an abuse of legal process. He, and he alone, has had all the circumstances of the case before him, and has had the opportunity of considering and appraising those circumstances, and it was his duty so to do. Is there any evidence to sustain his finding? Have his grounds been recognized as lawful and sufficient in other cases?

We have been referred to many cases in which circumstances more or less similar—sometimes stronger, sometimes not so strong—have been held sufficient to sustain an order depriving a successful party of costs, and sometimes compelling him to pay the costs of an unsuccessful party, even where there was a statutory provision that the costs should follow the event, unless special cause to the contrary was shown. The discretion to deprive is the same as the discretion to order payment of costs, and any case in which the exercise of that discretion was upheld against a *prima facie* right to costs is an *a fortiori* authority against the existence of any jurisdiction to reopen the question, or to consider it at all, where (as here) there is no such *prima facie* right.

In *Williams* v. *Ward* (1), in 1886, a libel, charging the chief officer of a ship with drunkenness and mismanagement, was justi-

(1) 55 L. J. (N. S.) Q. B. 566.

fied: the jury found for the plaintiff on the justification, with one farthing damages: yet he had to pay the costs of the defendant. In that case *Harris* v. *Petherick* (1) was cited, and the Court of Appeal, Esher, M.R., and Fry and Bowen, L.JJ., did not call on counsel for the defendant. Esher, M.R., said:—

> "We have repeatedly tried to lay down the *limit of our jurisdiction* in cases of this kind. There is an appeal upon the question whether or not there is good cause for the Judge to act; but if there is good cause, we cannot go into the question whether he exercised his discretion properly. If, from all the facts before the Judge, it appears" [and in a discretionary case this must mean appears *to him*] "that it was oppressive to bring the action, or that the action was oppressively conducted, then there is good cause . . . We must stop here, and decline to consider how far he exercised that discretion rightly."

In *Florence* v. *Mallinson* (2), an action for an injunction to compel the defendant to take down a wall which caused serious damage; though 40*s.* damages were proved and awarded for injury caused by the erection of the wall, the plaintiff was ordered to pay the defendant's costs, because the plaintiff proceeded with the action after the defendant had removed the wall. Kekewich, J., held that the claim in the action had no substantial foundation; the Court of Appeal refused to interfere, and Fry, L.J., said:—

> "You must show that there is something which takes it out of the discretion of the Judge."

In the present case the plaintiff brought this action for damages which he himself estimated as not exceeding £5 or £6. The Judge found this to be a "greatly exaggerated" estimate, that no damage beyond £1 was proved, and that the defendant had been forced into expensive litigation, in which, save to this small amount, she was substantially right. I cannot distinguish these circumstances from those which the English Court of Appeal, in *Williams* v. *Ward* (3), held to be sufficient ground for holding that the action was "oppressive," and to be sufficient to establish the absence of jurisdiction to reconsider the question of costs.

A remarkable series of cases occurred in 1888, when what was called "the vexed question as to depriving the plaintiff of costs"

(1) 4 Q. B. D. 611. (2) 65 L. T. (N.S.) 354. (3) 55 L. J. (N. S.) Q. B. 566.

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gave rise to a sharp conflict between Coleridge, C.J.—who, popularly speaking, "struck"—and the Court of Appeal. I refer to *Rooke* v. *Czarnikow* (1), *Moore* v. *Gill* (2), and *MacGregor* v. *Clay* (3). This conflict ended in the emphatic assertion by the Court of Appeal of the principle that, under ordinary circumstances, nominal damages meant that the action ought not to have been brought, and that it was *prima facie* good cause for depriving the plaintiff of his costs, and threw the onus upon him of showing the reason for bringing the action.

I venture to concur with O'Brien, L.C.J., in thinking that the same principle must apply to an action brought for £30 by a plaintiff who, when he came into Court, abandoned four-fifths of his claim, and, as to the remaining fifth, was wrong to the extent of £5 out of £6, leaving only £1 as the whole cause of action. That fact appears to me to bring this case to the very point at which the English Court of Appeal held in 1886, that it must stop, and decline to consider *how far* the Judge had exercised his discretion rightly.

The English cases to which I have referred are now from eighteen to twenty years old. Following them, as they have already been followed here in *Lyons* v. *Peacock* (4), I hold that we cannot entertain this appeal. Being satisfied, as to the order of Wright, J., that *factum valet*, I must not ask *Num fieri debet*? I cannot consider whether I would have made that order myself, nor indicate any opinion that it was—"ideally" or otherwise—correct.

HOLMES, L.J.:—

From the time of the Plantagenets until the Judicature Acts became law, statute after statute was passed for the purpose of regulating the incidence of costs in Common Law actions. The principle acted on in the early legislation on this subject was that full costs were to follow the event of the litigation—a good general rule, but likely to cause considerable injustice if applied in every case. Accordingly, at a remote period in our legal history the Legislature began to limit its operation by excepting

(1) 4 *Times* L. R. 669. (2) *Ibid.* 738. (3) *Ibid.* 715. (4) 12 L. R. Ir. 148.

therefrom actions of a defined character and class. For example, in cases of a certain kind and terminating with a certain result, there were to be no more costs than damages. In other cases, the plaintiff, if successful, was to have judgment for double or treble costs. In a third class the Judge was given a limited discretion, by making the whole or portion of a successful plaintiff's costs depend upon a certificate given or withheld by him. I doubt if these enactments either were or could be made wholly satisfactory. The circumstances leading to an action, the mode in which it is conducted, the benefit which the plaintiff derives from it, and the possibility of having his rights adjudicated upon in a cheaper form, vary infinitely; and the comparatively hard and fast rules of a statute must be inadequate to meet the many aspects of actual litigation. In these circumstances I can both understand, and also thoroughly sympathize with the fundamental change introduced by the Judicature Act. From the time that the Lord Chancellor and his fellow-Judges in Chancery began to adjudicate on civil rights on principles of equity, it was held by them that they had a discretion in awarding costs. They could make a successful plaintiff or defendant abide his own costs, and they could also order a successful plaintiff to pay his adversary's costs. There were, no doubt, rules of practice in the Courts of Chancery as to the award of costs in certain circumstances; but the general rule was that such award was to depend on the discretion of the Judge. The framers of the Irish Judicature Act having before them the two methods, made their choice, which was adopted by the Legislature. In language free from all ambiguity it is provided, by the 53rd section, that, subject to the provisions of this Act and of rules of Court, the costs of and incident to every proceeding in the High Court of Justice and Court of Appeal, respectively, shall be in the discretion of the Court, subject to certain exceptions, none of which is applicable to the present case. It cannot be argued that there are other provisions of the Act or rules of Court controlling this section; and, therefore, the costs in an action such as this come within its terms. Then we have the 52nd section, which provides that no order as to costs, which by law are left to the discretion of the Court, shall be subject to any appeal unless by leave of the Court or Judge making such order.

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I am of opinion that the result of the case now before us depends on these two sections. If the costs of this action are placed wholly within the discretion of the Judge who tried the case, and if he exercised such discretion without giving leave to appeal, there is an end of the controversy. This Court has no jurisdiction to review his order. He not only exercised his discretion, but we have been told by him the grounds on which he acted. He says that he was of opinion that the action was one of the most trivial and insignificant that could possibly be brought; that it should never have been commenced by writ in the Superior Courts; that the plaintiff's own estimate of his loss on all his claims was only £5 to £6, and that this figure was, in the Judge's opinion, greatly exaggerated. The Judge also tells us that he considered it to be a wrong and an abuse to bring such an action in the Superior Courts, and that the plaintiff should pay the penalty of the extra costs thereby occasioned. No better grounds for the exercise of judicial discretion could be given in making either an order that the plaintiff should abide his own costs, or an order that he should pay the costs of the defendant. I am of opinion that there is no distinction in kind between the two orders suggested. If the one is in the discretion of the Judge, so also is the other. Although this is my own clear opinion, I should be quite prepared to yield to authority laying down a contrary proposition; but the cases referred to by the Lord Chief Baron establish that since the Judicature Act the Court or Judge may, in the exercise of its or his discretion, order a successful plaintiff to pay the whole or portion of the costs of the defendant, and that no appeal lies from an order of this kind. I may add that, as far as I am concerned, I had no wish to have any further report of the trial from Mr. Justice Wright than that furnished by him in the first instance. It was quite sufficient from my point of view, because, even if a further report might have led me to think that the discretion of the Judge ought to have been exercised differently, I should still have been of opinion that I had no jurisdiction to review it.

Solicitor for the plaintiff: *William A. M'Mullen.*
Solicitors for the defendant: *James Dunne & Sons.*

R. ST. J. C.

DEANE *v.* WILSON (1).

K. B. Div. 1906.

May 14. June 28.

Master and servant—Contract of employment—Weekly wage for specified hours—Bonus for full-time work—Failure to put in full time—Deduction of bonus—Truck Acts (1 & 2 *Wm.* 4, *c.* 37; 59 & 60 *Vict. c.* 44, *s.* 1).

A workwoman was employed at 8*s.* per week of 55½ hours, with a bonus of 2*s.* per week for full attendance, and that alone. Printed rules, posted in the factory of employment, admittedly read by the workwoman, provided, *inter alia*, that "any person absent without reason, and not assigning satisfactory reason, shall lose bonus." The workwoman being absent for a quarter of a day without sufficient reason, 2*s.* 4*d.* was deducted from the weekly sum of 10*s.* which would otherwise have been payable to her. No question being raised as to the 4*d.* (representing the quarter of a day's wages):—

Held, that the deduction of the 2*s.* bonus was not an offence under the Truck Acts.

CASE STATED for the opinion of the Court at the instance of the complainant, Lucy A. E. Deane, Inspector of Factories, in respect of an adjudication by the magistrates at Newry Petty Sessions on April 25th, 1906. The defendant was Abraham Wilson, a partner in the firm of Abraham Wilson & Co., and the charge against him was set out in the summons as follows:—"For that on or about the 10th day of February, 1906, at Edward-street, Newry, in said district and county, you being the employer of a certain workwoman, to wit, Theresa Dixon, did, contrary to the provisions of the Truck Act, 1896, unlawfully make a certain deduction of 2*s.* from the wages of the said Theresa Dixon in respect of a fine, in that such particulars in writing as are required by the aforesaid Act were not supplied to the said Theresa Dixon on the occasion when the deduction was made, whereby you are liable to a penalty of not less than £5 and not exceeding £10." The magistrates dismissed the charge on the merits; but, upon the application of the complainant, consented to state a case, which they did as follows:—

(1) Before LORD O'BRIEN, L.C.J., and ANDREWS and KENNY, JJ.

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At the hearing of the said complaint it was proved, on the part of complainant, that the said Theresa Dixon was a workwoman in the spinning factory of Abraham Wilson & Co. at Edward-street, Newry. She deposed that she had been employed in the factory for a lengthened period, in fact since childhood. She also admitted that she had read the printed rules of the factory, and that they were posted up in the works. The third rule was—"Any person being absent without reason, and not assigning satisfactory reason, shall lose bonus or be discharged, or may be prosecuted according to Act of Parliament, as may be considered necessary under the circumstances."

The said Theresa Dixon proved that when she served full time in the factory she received the sum of 10*s.* for the week of 55½ hours. However, when she was out a quarter day (and did not thereby serve full time), there was a deduction from this sum (10*s.*) of 2*s.* 4*d.* This deduction was made on or about the 10th February, 1906. The witness admitted that she had been out the quarter day during the week then being paid for. She did not go to work on one of the mornings of the week until 9.45 o'clock—after the breakfast hour. She should have been at the factory, to keep full time, at 6.30 o'clock a.m.

For the defence it was proved by Messrs. James Wilson, a partner in the Company, and E. J. Kilbraith, book-keeper of the firm, that the wages of Theresa Dixon (and others at the same work) were 1*s.* 4*d.* per diem.

However, for some years past, in order to obtain a full attendance of the workwomen in this factory, the management decided to give a bonus of 2*s.* per week for full attendance, and for that alone.

The quarter day's wages (at 1*s.* 4*d.*), which were not earned, and the bonus (for full-time week) were not paid to Theresa Dixon on 10th February, 1906.

It was contended by the complainant that under 1 & 2 Wm. 4, c. 37, s. 25 (extended to Ireland by 50 & 51 Vict. c. 46), the bonus was "wages" within the meaning of the statute quoted; that the deduction was "a fine"; and that an offence had been committed (when the statutes were together construed) under 59 & 60 Vict. c. 44, s. 1, clause 2 (*b*).

The Justices were of opinion—1st. That the minimum penalty (claimed in the said summons) of £5 under 1 & 2 Wm. 4, c. 37, s. 9, was expressly repealed by 47 & 48 Vict. c. 43 before the extension by the later statute (50 & 51 Vict. c. 46) to Ireland; that the statute then existing and in full force and virtue, depleted of the minimum of £5 for a first offence, was the Act they had to administer; that under the statutes quoted there was now no minimum penalty for a first offence. 2nd. That the "wages" of Theresa Dixon were 1*s.* 4*d.* per diem, and that there was no deduction made from the "wages" on 10th February, 1906, save for a quarter day, when she was admittedly absent from the factory—a wage which she did not earn; that the 2*s.* per week was given as a bonus or prize in special consideration for full time of 55½ hours kept by the worker each week; that it would not be computed as "wages," as it was not given for excellence of nor for extra work, but was a premium for full time, and that therefore no fine had been inflicted.

The Solicitor-General (*Redmond Barry, K.C.*) and *Dudley White*, for the complainant:—

The 2*s.* was a sum that the employee was contractually entitled to receive on completing a certain number of hours work in the week, and consequently was wages. The words "sum contracted to be paid" in sect. 1 of the Act of 1896 were used in view of the experience of years and the devices of employers to evade the previous Acts. This is a penalty for not doing full time.

Chambers, K.C., and *F. Redmond*, for the defendant:—

A fine is punishment. This was a contract that if the employee worked for a certain number of hours she was to get 10*s.*, and that if she did not work for so many hours she was to receive only 8*s.* The Truck Acts never affected the amount of wages to be paid; they dealt only with the mode in which wages were to be paid. The 2*s.* never became wages, because it was never earned, and could never have been sued for.

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[They referred to *Squire* v. *Bayer & Co.* (1); *Williams* v. *North Navigation Collieries, Limited* (2); *Buxton Lime Firms* v. *Howe* (3); Employers and Workmen Act, 1875, sect. 4.]

ANDREWS, J.:—

The offence charged against the defendant in the summons in this case is that, being the employer of Theresa Dixon, a workwoman, he, contrary to the Truck Act, 1896, made a deduction of 2*s.* from her wages, in respect of a fine, particulars in writing, as required by that Act, not having been supplied to her on the occasion on which the deduction was made.

The argument proceeded on the construction of the Act, which I shall consider apart from any technical objection to the form of the summons.

The Act (59 & 60 Vict. c. 44) provides by sect. 1, clause (1), that an employer shall not make any contract with any workman for any deduction from the sum contracted to be paid by the employer to the workman . . . for, or in respect of, any fine (unless under certain specified circumstances which I shall assume do not exist in this case); and the Act further provides by sect. 1, clause (2), sub-clause (*b*), that an employer shall not make any *such* deduction unless particulars in writing showing the acts or omissions in respect of which the *fine* is imposed, and the amount thereof, are supplied to the workman on each occasion when a deduction . . . is made. No such particulars were given in the present case. The 4th section provides that if any employer enters into any contract contrary to the Act, or makes any deduction . . . contrary to the Act, he shall be guilty of an offence against the Truck Act, 1831, and shall be liable to the penalties imposed by sect. 9 of that Act as if the offence was an offence in that section mentioned.

The offence with which the defendant is charged is thus, by the Act of 1896, made an offence under the Act of 1831, which that Act did not itself make provision for. Before determining that a new offence created by statute has been committed, it ought

(1) [1901] 2 K. B. 299. (2) [1904] 2 K. B. 44; [1906] A. C. 136.
(3) [1900] 2 Q. B. 232.

to appear that the facts relied on in support of the charge clearly establish the offence so created.

The facts in the present case are that for a working week of 55½ hours, the sum which the worker would, under her contract of service, be entitled to receive from the defendant, as her employer, would be 10*s.*, if she worked for the full time of 55½ hours; that her wages were at the rate of 1*s.* 4*d.* per day, making 8*s.* for the week, with an addition, called a bonus, of 2*s.* per week for full attendance, and for that alone.

During the week ending the 10th of February, 1906, she did not give full attendance, having remained off for a quarter of a day. Four pence, which represented the quarter day's wages, was not paid to her. This non-payment has not been alleged to have constituted an offence under the Act, and I understand it to have been admitted that it did not constitute an offence under the Act. The 2*s.* which the worker would have been entitled to, if she had given full attendance, but which she never became entitled to, was not paid to her, and the question is, Did this non-payment constitute an offence under the Act? In my opinion it did not, and I think the magistrates' determination "that the charge be dismissed on the merits" was correct in point of law. I am unable to hold that the non-payment of the 2*s.*, which was not earned, and never became due, was a *deduction* from the *sum contracted to be paid* to the worker. There was no contract to pay it unless it was earned. If she had not worked at all during the week, though the contract for service remained, she would not have been entitled to any payment; and could it be said that when, being entitled to nothing, she was paid nothing, the non-payment was an offence under the Act? Further, even if this non-payment of the 2*s.* which she did not earn could be possibly held to be a deduction from the sum contracted to be paid to her, it could not, in my opinion, be held to be a deduction for, or in respect of, a *fine*. The non-payment took nothing from her to which, in any view, she had become entitled, or to which, when the week ended, she could have ever become entitled. It was simply withholding payment of what she had not earned, and never could earn. I do not think that the Act was ever intended to apply to such a case, which, in my opinion, is not within its letter

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or spirit. I can see nothing unfair or unreasonable in a contract with a worker to pay him so much a day for each day he works, and if he works full time for a week to give him, at the end of the week, an additional sum, in consideration of his uninterrupted work. Such a contract is beneficial to both the employer and the employed. Under it the worker gets an additional payment to which he would not otherwise be entitled, and the employer gets, what may be very important for him, uninterrupted work. To hold that non-payment of such an addition, when not earned, was an offence under the Act, would, in my opinion, be to deprive the employer of a fair and reasonable means of securing uninterrupted work. The non-performance of one worker's work in a factory may in many cases cause injurious interruption of the work of others, whose work may be dependent upon the work of the defaulter, and thus cause a much greater injury to the employer than the mere loss of the work of the defaulter. I think the acquittal of the defendant was right, in point of law, and ought to be affirmed.

KENNY, J.:—

The questions for our decision in this case arise on a "case stated" by the Justices at Newry Petty Sessions on the hearing of a summons by the complainant, a Factory Inspector, against the defendant, Abraham Wilson, who is described in the "case" as a partner in the firm of Abraham Wilson & Co., Limited. If the Company be one incorporated under the Company's Acts, I presume that Mr. Wilson is a director—not a partner. The charge contained in the summons is that the defendant being an employer of a workwoman named Theresa Dixon, did, in contravention of the Truck Act, 1896, unlawfully make a deduction of 2*s.* from her wages in respect of a fine, without supplying to her such particulars in writing as are required by section 1, sub-sect. 2 (*b*), of the Truck Act, 1896 (59 & 60 Vict. c. 44).

The facts, as found, are these:—Theresa Dixon was a workwoman in the defendant's spinning factory in Newry. Her wages were 1*s.* 4*d.* a day; and for some years past the defendant's Company, in order to obtain a full attendance of their workwomen, had been giving a bonus of 2*s.* a week for full attendance, and,

according to the evidence of the defendant's witness, for that alone. Full attendance meant 55½ hours a-week. Absence from work, even for a quarter of a day, involved the loss of the whole 2*s.* at the end of the week, in addition to a deduction from the daily wage proportionate to the period of absence. The defendant's printed rules were posted up in the factory, and the workwoman admitted that she had read them. One of them was as follows:—"Any person being absent without reason, and not assigning satisfactory reason, shall lose bonus, or be discharged, or may be prosecuted according to Act of Parliament, as may be considered necessary under the circumstances."

In the first week in February last the workwoman was absent for a quarter of a day, and at the end of the week she received in respect of her week's work a sum of 7*s.* 8*d.* instead of the 10*s.* (made up of the 8*s.* and 2*s.*) to which she would have been entitled had she put in the whole 55½ hours. The sum of 2*s.* 4*d.* not received by her represented the bonus of 2*s.* and the unearned wage of a quarter of a day, namely, 4*d.*

The complainant contended before the Justices that the sum payable for full time was part of the "wages" of the workwoman, and that the 2*s.* withheld by the defendant's Company was a "fine" within section 1, sub-sect. 2 (*b*), of the Truck Act, 1896.

The Justices were of opinion that the "wages" were 1*s.* 4*d.* a day, and that there was no deduction made from the said wages save for the quarter-day,—that the 2*s.* a week was given as a bonus, prize, or special consideration for full time of 55½ hours a week,—and that the 2*s.* would not be computed as wages. They accordingly held that there was no "fine" inflicted, and dismissed the summons.

The correctness of the magistrates' decision depends on the construction of the Truck Act, 1896. The latter, together with the Truck Acts, 1831 and 1837, forms a code; but it was admitted by the Solicitor-General that we are not concerned with the terms of the Act of 1831, inasmuch as it does not purport to deal with "fines," and the complainant's case here is dependent on the retention of the 2*s.* being regarded as a fine. The Act of 1831 is, however, important as showing that the evident intention of the Legislature was to ensure, as far as possible, that workmen should receive their

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wages in actual cash. Wages were by the 25th section deemed to include any money or other thing had or contracted to be paid, delivered or given as a recompense, reward, or remuneration for any labour done, or to be done—and the Act made void all contracts that stipulated for a payment of wages, as so defined, otherwise than in coin of the realm, and all stipulations respecting the manner in which such wages were to be expended. But the Act did not deal with deductions from wages save by enacting that in an action for recovery of the latter the employer was not to be at liberty to set off a claim for goods received by the workman on account of wages or supplied to him at any shop belonging to the employer. The Act of 1896 for the first time introduces provisions in regard to "fines"; but, more important still, it abandons the word "wages," and in its place uses the expression "sum contracted to be paid by the employer to the workman." These substituted words were, I have no doubt, intended to be, and I think they probably are, wider in their scope than the term "wages"; but, whether that be so or not, it does not, in my opinion, affect the question we have to decide, which is, Was the non-payment of the 2*s.* "a deduction for, or in respect of, a fine"? The 2*s.* a week in a certain event does become part of the "wages," and it, no doubt, is a sum contracted to be paid; but, on the evidence, its payment is altogether conditional. The 1st section of the Act provides that an employer is not to make a contract with any workman for any deduction from the sum contracted to be paid, for, or in respect of, any fine, or make any such deduction, unless subject to certain conditions and restrictions—and section 4 makes any contravention of the terms of section 1 an offence, and prescribes a penalty. The Act contains no definition of a "fine," nor does it supply any test for arriving at its statutory meaning. The ordinary and popular meaning of the word "fine" imports a penalty for an act of commission or omission. It is possible to impose it in at least two ways, namely, by the exacting of a payment or by a deduction. There is no question here of the exacting of a payment. If it be by deduction, there is necessarily a process of subtraction from some integer to which, but for the imposition, the individual would be entitled. According to the evidence the workwoman is paid a daily wage of 1*s.* 4*d.* She is entitled to that sum conditionally on

her giving an entire day's work. If she fails to give a full day's work, she receives only a part of the 1*s.* 4*d.* proportioned to the time she has worked. The remainder of the 1*s.* 4*d.* in such a case is unearned and, consequently, not payable. The wages, whether fully earned or not, are payable once a week. At the end of the week the workwoman may be entitled to be paid for 6 full days or for a shorter period. If she has worked for only 5½ days, could it be said for a moment that the half-day's wage, in respect of which payment is withheld, is in the nature of a fine or penalty? It represents unearned money, and nothing more. The 4*d.* withheld in this case was never earned and never payable. In what material respects does it differ from the 2*s*? The latter was also conditionally payable. It, too, had to be earned before the workwoman could claim it. No doubt, if it was earned it might be regarded as portion of the sum contracted to be paid, and undoubtedly it would be recoverable. But it must be earned in accordance with the contract. The workwoman here had not a weekly wage of 10*s.* She had a daily wage payable weekly. If this 2*s.* so withheld was a fine—apart from the Act of 1896—what was it deductible from? Suppose she worked one full day, and no more: she would be entitled to receive 1*s.* 4*d.*, or, if her evidence as to 10*s.* being the weekly wage is right, then 1*s.* 8*d.* In that case how is the 2*s.* to be deducted? Is she to receive no payment at all, or is a proportionate part of the 2*s.* to be deducted, or is she to receive the full day's wage without any deduction? The contention for any one of those possibilities would be absolutely opposed to the contract between the parties, and, to my mind, establishes that this 2*s.* withheld is a mere bonus and not a fine. According to the contract the right to it might be lost on the very first day of the week by the woman's absence for, say, quarter of a day. Consequently it was never earned. Its non-payment is simply the contractual result of the woman's failure to work for a certain stipulated period.

It was suggested in the course of the argument that this arrangement for a bonus to those workpeople who would work their full week of 55½ hours was really a device or contrivance for evading the provisions of the Act of Parliament. I cannot for a moment think so. Mr. Chambers put it to us very strongly—and I am sure in complete accordance with the course of things and

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methods of work in the great North of Ireland factories—that each department and each particular class of machinery are dependent for their regular and continuous working and the amount of manufactured stuff they can turn out on the absolute co-ordination of all the departments. I can well understand that position, and fully appreciate the dislocation that would ensue and the effect which the stoppage of the machines for want of a sufficient number of operatives or any other reason might have upon the output of the factory, or any section of it. I believe the offer of a bonus in the present case for punctual and regular attendance to be a perfectly *bona fide* effort on the part of the Company to ensure the latter; that it in no respect savours of a device or contrivance to evade the conditions of the Truck Acts, and that the non-payment of the 2*s.* cannot be regarded as a fine. The magistrates were, therefore, in my opinion, correct in the determination at which they arrived.

ANDREWS, J.:—

The Lord Chief Justice, who is unable to be present, has authorised me to state that he concurs in the judgment of the Court.

Solicitor for the complainant: *Malachy Kelly.*
Solicitors for the defendant: *Carey & Harris.*

J. L.

THE KING (COTTINGHAM) *v.* JUSTICES OF COUNTY CORK (1).

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Jan. 22, 23. Feb. 2, 26.

Appeal. May 3, 4, 7, 9.

License—Licensing Acts—Brewer of beer for sale—Wholesale beer-dealer's license—Certificate—Incorporated Company—Right to obtain license—Residence of Company—27 & 28 *Vict. c.* 35, *ss.* 3, 4—37 & 38 *Vict. c.* 69, *ss.* 8, 37—Certiorari.

A Company of brewers, incorporated under the Companies Acts, brewed beer in the city of Cork, and had a depot for the supply of it in Macroom, for which they held a wholesale beer-dealer's license. Having built new premises in Macroom, they applied for and obtained in the name of the Company, at the Licensing Sessions at Macroom, a certificate for a wholesale beer-dealer's license for such new premises. Twenty-one days' notice of the application had been given to the District Inspector of Constabulary of Macroom district. On an application by the District Inspector for a writ of *certiorari* to quash the order granting the certificate, on the grounds that such license could not be held by an incorporated Company; that the Company had not a residence in Macroom; and that notice of the application should have been served, not on the District Inspector of Macroom, but on the District Inspector of the district in which the Company resided:—

Held, by the King's Bench Division, that an incorporated Company was capable of holding such license, and of obtaining a certificate for the same in its own name; that the Company had a residence in Macroom; and that service of notice of the application on the District Inspector of Macroom was sufficient.

Held, by the Court of Appeal, that sect. 8 of the Licensing Act, 1874, does not apply to brewers, and that the certificate was unnecessary and valueless.

Certiorari refused.

CERTIORARI.

Beamish & Crawford, Limited, were a Company registered under the Companies Acts, 1862 to 1900, carrying on the business of brewers in the city of Cork, where they brewed ale, stout, and porter, and having several depots for the storing of their manufacture in different towns in the county of Cork and elsewhere for the convenient supplying of same to the district surrounding

(1) In the King's Bench Division, before PALLES, C.B., and JOHNSON and KENNY, JJ.

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such towns. For each of their depots they held wholesale beer-dealers' licenses which, since the incorporation of the Company in the year 1901, had been taken out in the name of the Company.

Amongst other towns in which the Company held such licenses was Macroom. The premises in Macroom to which the license was attached were held by the Company under a contract of tenancy from year to year; and being old and dilapidated the Company procured a site in another place, in the vicinity upon which they built new premises, and they applied on the 27th September, 1905, at the Annual Licensing Petty Sessions for the Petty Sessions District of Macroom for a certificate for a wholesale beer-dealer's license for such new premises. Twenty-one days notice in writing of the intention to make the application was given to the District Inspector, R.I.C., of the Macroom District. This notice was as follows:—

"We hereby give notice that it is our intention to apply at the Annual Licensing Petty Sessions to be held at Macroom, in the town of Macroom, on the 27th day of September, inst., for the Justices' certificate for a wholesale beer-dealer's license to sell beer by wholesale not to be consumed on the premises at the new house and premises recently erected by us on the north side of the Main-street . . . . . in the parish and town of Macroom and county of Cork, which license is to be in lieu of our existing wholesale beer-dealer's license for our premises in the Square, Macroom, aforesaid. Dated the 4th day of September, 1905. Sealed by Beamish & Crawford, Limited, in presence of Richard H. Beamish, Director, J. J. Mahony, Secretary."

The application was opposed by the prosecutor, the District Inspector of the Macroom District; but the Justices granted the certificate, which was to the following effect:—

"We, being two of the magistrates presiding at Petty Sessions for the District in which Beamish & Crawford, Limited, wholesale and retail beer-dealers, reside, do hereby certify that we consider them to be persons of good character, and that their house in the Main-street, Macroom, in the parish of Macroom and county of Cork, has been conducted in a peaceable and orderly manner during the past year; that the said house and premises have been in the occupation of the said Beamish & Crawford, Limited,

for upwards of three months, and are rated for the relief of the poor at £8 per annum." Dated, &c.

The prosecutor obtained a conditional order for a writ of *certiorari* to quash the order of the Justices, granting the certificate, on the following grounds:—

1. That inasmuch as Beamish & Crawford were a firm of brewers having their head office in the city of Cork, and resided outside the Petty Sessions District of Macroom, there was no jurisdiction in the Justices to sign the required certificate.

2. That the twenty-one days notice of the applicants' intention to make such application was served upon the said Thomas Cottingham, instead of being served upon the District Inspector of the District in which the person applying for the required certificate resided; and that the twenty-one days notice had not been served in accordance with the requirements of the statute made in that behalf; and that due service of the same was a condition precedent to jurisdiction.

3. That if the license was to be granted, it should be granted, not to the applicants, but to their local agent or manager.

4. That neither Richard Beamish nor A. F. Sharman Crawford, who constitute the firm of Beamish & Crawford, resides within the Petty Sessions District of Macroom, but they reside in the city of Cork.

Cause having been shown by Beamish & Crawford, the present application was, on behalf of the prosecutor, to make the conditional order absolute, notwithstanding cause.

The Solicitor-General (*Redmond Barry, K.C.*), and *Dudley White*, for the prosecutor.

Ronan, K.C., and *Jefferson*, for Beamish & Crawford.

PALLES, C.B.:—

Feb. 26.

Beamish & Crawford, a Limited Liability Company incorporated under the Companies Act of 1862, are brewers of beer, having their brewery in the city of Cork. They have also several houses throughout the south of Ireland, which have been called during the argument "distributing centres," in which

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they sell strong beer in quantities of not less than 4½ gallons, to be consumed elsewhere than on their premises. A license authorising these sales is required for each of these centres, because the exemption from duty in favour of brewers of beer is by 13 & 14 Vict. c. 67, s. 6, limited to sales at their brewery premises. These licenses they have been in the habit of taking out in their own name, feeling, as their counsel state, that inconvenience must result from having them in the names of their employees. Accordingly, they applied at the last Licensing Sessions for and received a certificate, under the Beerhouses (Ir.) Act, 1864, s. 3, and the Licensing (Ir.) Act, 1874, authorising the grant of a license to them in their own name. This was objected to by Mr. Cottingham, the District Inspector of Constabulary, on three grounds. Of these, two are comparatively unimportant, and relate to the particular District Inspector on whom the notice of the application ought to be served, and the place of residence of the Company, which should be stated in the notice. The third, however, is an important one. It is that an incorporated Company is incapable of obtaining such a license, because, as is alleged, a certificate of good character is a condition precedent to obtaining the license; and it is said that an incorporated Company is incapable of having such a character, within the meaning of sect. 3 of the Act of 1864. A *certiorari* is now applied for, nominally by Mr. Cottingham, but really by the Crown, to bring up this certificate; and the main contention of the Crown has been that an incorporated Company is not capable of obtaining a certificate under sect. 3 of the Act of 1864.

It has been stated to us by the Solicitor-General that the practice in Ireland of the Inland Revenue, since 1864, has been to grant these licenses to the managers of incorporated Companies, and not to the Companies themselves; but that in England, where there is no statutable provision similar to sect. 8 of our Licensing Act, 1874, the licenses are usually in the name of the Companies themselves. I need not, however, state that the statutes of 1864 and 1874, on the construction of which the question depends, are quite too modern to allow the practice under them to be taken into consideration as "*contemporanea*

expositio" in aiding their construction. Our judgment must be based upon the construction of those statutes, without regard to the practice.

The argument of the Solicitor-General, as I have said, is that a body corporate is incapable of having a "good character," within the meaning of that expression in sect. 3 of that statute, and that therefore it cannot obtain the certificate which by that section is made a condition precedent to the grant of the license.

Whilst this is contested by Mr. Ronan, he has also insisted that, if this contention of the Crown were true, it would necessarily follow that such a Company cannot be a "person" within the meaning of that section, and therefore would be entitled to a license without the certificate. This latter question is not, in strictness, open upon this motion for a *certiorari*. The apt mode of raising it would be by an application for a *mandamus* to the Inland Revenue to issue the license; but it was so closely mixed up with the contention of the Crown that we allowed it to be argued, reserving the question whether we would not make a conditional order for a *mandamus*, if by reason of our judgment on the construction of the statute, such a proceeding became necessary for giving effect to that judgment.

At the root of the question lies the consideration of the proper person to whom such a license should be issued when the real trader is an incorporated Company. I am aware that much difference of practice, and as I believe much irregularity, exists as to the names in which licenses are taken out even when the real trader is a natural person and not a Company—still the questions will some day arise, Is a license rightly issued to the manager of a Company? Can the incorporated Company lawfully sell beer under such a license? I am inclined to hold that each of these questions should be answered in the negative.

The duty is imposed by 6 Geo. 4, c. 81, s. 2, "For and upon every excise license to be taken out by any . . . trader, dealer, or person hereinafter mentioned (that is to say) Every person . . . . who shall *sell* strong beer, &c., &c." The sale of the beer is by the Company, as principal. It is not the sale of the manager, who is no more than the known agent of the Company,

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and acts as such in the sale. This seems to be elementary; but if authority be required in support of it, it will be found in a case which excited much interest at the time of its decision, *Williamson* v. *Norris* (1), which was an information against a servant of the House of Commons for a penalty under sect. 3 of the Licensing Act, 1872, for selling intoxicating liquor at a bar within the House. The ground of the decision of the King's Bench dismissing the information, was stated by Lord Russell of Killowen to be that the true meaning of the words of sect. 3, "no person shall sell . . . without being duly licensed," was that the sale which was prohibited "must be a sale by the person who ought to be licensed."

A similar construction must be given to 6 Geo. 4, c. 81, s. 2. The person who is to sell is the person who is to be licensed to sell; and the same reasoning which led to the acquittal of the servant in *Williamson* v. *Norris* (1) would secure the conviction of the Company here, if it sold without an authorising license. But, however this may be, of one thing I am clear, that whoever is entitled to sell is entitled to apply for a license in his own name, and not to subject himself to the many risks incident to his salaried servant obtaining such power as is involved in his being the licensee.

Coming, then, to the construction of the Act of 1864, it must be admitted that, prior to its passing, an incorporated Company had an absolute right, on payment of the proper duty, to obtain a license authorising it to sell beer by wholesale, in the same way as such a Company may, and does every day, obtain it in England. If, then, that Act has had the effect insisted upon by the Solicitor-General, viz., that an incorporated Company cannot now obtain a license without a certificate, and cannot obtain such a certificate because it is incorporated, the result would be that the Act would prohibit the sale of beer by wholesale by incorporated Companies; at least it would prohibit them selling in their own names. Such a construction ought not lightly to be arrived at. To use the words of Lord Selborne, "It does seems to me to be best to remember the principle that the liberty of the subject ought

(1) [1899] 1 Q. B. 7.

not to be held to be abridged any farther than the words of the statute, considered with a proper regard to its objects, may require" (1).

Now, does the object of the statute require this total abrogation of the previously existing right of a public Company? My opinion is that it does not. Its object is to regulate, not to extinguish, the sale of beer. Before the statute, any person, whatever might be his character, might carry on the trade of selling beer by retail to be consumed off the premises, and the fitness of the house for the purpose, and the carrying on of the trade in an orderly manner, were not conditions precedent to the renewal of the license. The Legislature seems to have been of opinion that, for the future, licenses should be granted only in respect of premises suitable for the purpose, and under circumstances which would render it likely that the trade would be carried on in a peaceable and orderly manner. It, therefore, required as a condition to the grant of a license, a Justices' certificate that the premises were suitable, and, when the license was a renewal, that the certificate should extend to the peaceable and orderly conduct of the business during the last year.

The Legislature, however, required something further. It considered, and undoubtedly correctly, that by restricting the grant of licenses to persons of good character, a further guarantee would be afforded as to the mode in which the business would be carried on. This was a most effective guarantee, so long as the trade was carried on personally by the licensee.

But the licensee was not bound to carry on the trade by himself personally. He might lawfully carry it on, and as a matter of fact did frequently carry it on, not by himself, but by his manager. In such a case, the guarantee afforded by the certificate of "good character" was necessarily of a different kind. Still it might be very effective. The fact that a licensed person, who had many licensed houses, enjoyed the reputation that (either by himself, or by other efficient persons of good character) he used care in the selection of his managers; that he closely attended to, and constantly superintended, the carrying on of the

(1) 5 App. Cas. 867.

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trade; that he stopped any irregular acts committed in the course of it the moment they came to his knowledge; that he kept a tight rein over his managers and other employees, and visited their improper conduct with dismissal when deserved; would add largely to the probability that his trade would be carried on peaceably and orderly.

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Is, then, a body corporate a "person," within the meaning of sect. 3? Apart from the question arising upon the certificate of good character, I have no doubt that it would be. The mischief to be remedied was the absence of sufficient control over the mode in which the trade was carried on. That trade could be carried on by all persons, either natural or artificial. The mischief was co-extensive with the trade. The remedy, to be complete, should extend to all persons, whether natural or artificial. It is out of the question to allow the plain intention of Parliament to be defeated by a beer dealer associating six persons of straw with himself, and by the formal process of incorporating themselves—a process they could adopt at their own mere will—render partial and inefficient that which was intended by Parliament to be a complete and universal remedy. I do not refer to the authorities on the subject, as I fully considered them during the present sittings in *The King* v. *The Chairman and Justices of Antrim* (1).

I, therefore, approach the question of the certificate with two principles impressed upon my mind, which ought, if possible, to be adopted in the construction of the section.

(1) That the construction should be such as should bring bodies corporate within its ambit. This can be done only by reading "person" as including bodies corporate; but

(2) That if that object can be effected without extinguishing the liberty which incorporated Companies had before that Act, of trading as beer dealers, that liberty ought to be preserved.

The only difficulty that presents itself in adopting a construction which will effectuate those two great principles, is the certificate; the alleged impossibility of an incorporate company being able to have a good character, or a character at all. But I cannot appreciate the difficulty. I cannot see why a public Com-

(1) [1906] 2 I. R. 298, at p. 326.

pany cannot have a character. No doubt it has no soul; but it can act by others, and through others do acts which in the case of a natural person would affect conscience, and be the foundation of that reputation which the law knows as "character," be it good or bad. It can be guilty of fraud, of malice, and of various criminal offences, some of commission, others of omission; some punishable summarily, others by indictment. "Character," as used in the section, means "reputation." Reputation is acquired by conduct. The conduct of the authorised agents of a Company is *its* conduct. Why should not that conduct give rise to a reputation as to its character, good, bad, or indifferent? An unincorporated Company of seven persons can acquire a reputation for fair dealing, for truth in their representations, for close supervision of their business, for carrying on their business in an orderly and peaceable manner. But this reputation is not that of an individual. It is, or may be, something different from the reputation of each. It may be a reputation acquired by the aggregation of the seven; as the reputation of an unincorporated bank for solvency. Why cannot those seven persons acquire a similar reputation by their action in aggregation, although that aggregation has assumed the more intimate form of incorporation?

But then it is said the reputation of good character must be of good character in respect of something other than that of the manner in which the business is carried on in the licensed premises, as the certificate must go to this as well as to the good character of the licensee. This may be so. But if a Company has many beerhouses, it can obtain a reputation from the mode in which all are carried on, and this is more extensive than, and a different thing from, that which would arise from the conduct of the one particular house under consideration. In *The King (Bourke)* v. *The Justices of Dublin* (1) it was held that the breach of an undertaking openly given might affect character. Why should not a reputation for strictly fulfilling undertakings also affect character? I cannot see any difficulty in an incorporated Company acquiring a reputation of good character within the

(1) [1903] 2 I. R. 429.

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meaning of section 3, and I am accordingly of opinion that a certificate under that section can be given to a body corporate, and that therefore the main objection of the Crown to this certificate fails.

The second and remaining objection is, that the notice should have been served on the District Inspector of the city of Cork, where the principal office of the Company is, and that the residence of the Company stated therein should be their premises in the city of Cork—not those in Macroom. As to this, I shall say no more than that, in my opinion, the Company resides, within the meaning of sect. 3, at Macroom. It has also a residence in the city of Cork, and may possibly be said to reside there within the meaning of the section; but I think that the residence at Macroom is more nearly within the spirit of the section than is that at Cork. It follows that Mr. Cottingham was the proper District Inspector to be served.

Thus, all the objections taken by the Crown fail.

Mr. Ronan, however, has himself raised a further objection, which, if valid, would show that the Justices had not jurisdiction to give the certificate, and would consequently coerce us to issue the *certiorari*, although we might, upon mandamus, compel the Inland Revenue to issue a license, notwithstanding the absence of a certificate. He relies upon the definition in the 37th section of the Act of 1874, of the words "wholesale beer-dealer's license." The definition is that it shall mean "a license to any person, *not being a brewer of beer*, authorising" him to sell, &c. Mr. Ronan contends that reading this definition into the 8th section would render that section inapplicable to the present case, which is that of a license to a brewer of beer. The answer to this objection, so far as it bears upon the application, is that it is not taken in the conditional order, and consequently that it cannot be relied upon. The question is an important one, and must be raised in a proper manner.

In result, all the objections fail, and the motion for a *certiorari* must be refused, with costs.

JOHNSON, J.:—

The partnership firm of Beamish & Crawford, well-known wholesale brewers for sale in the city of Cork, with agencies through the county of Cork, was incorporated in 1901 under the Companies Act, 1862, as "Beamish & Crawford, Limited"; and, pursuant to the Revenue Act, 1898 (1), made the proper excise entry in their corporate name, and thenceforth have been licensed in their corporate name as wholesale brewers for sale in the city of Cork, pursuant to sect. 10 of the Inland Revenue Act, 1880 (2), which (sect. 2) defines the word "person" to include "a body of persons whether corporate or incorporate." The breweries and head offices of the Company are in the city of Cork; but also, as wholesale beer-dealers (presumably authorised by their Articles of Association), the Company possesses departments under the management and care of their agents and managers in different towns in the county of Cork and elsewhere for conveniently storing and supplying their beer in those localities and the surrounding districts; and the secretary of the Company states in his affidavit (par. 1) that for each of these depots the Company holds in its corporate name a wholesale beer-dealer's license (3). This practice is now challenged in the present case.

In the town of Macroom, in the county of Cork, the Company held as tenants from year to year a house which they used as a depot for their beer, and for which they held a wholesale beer-dealer's license; but this house, being old and dilapidated, was unsuitable any longer for their business in Macroom as wholesale beer-dealers, and the Company therefore erected suitable premises for their business within 200 yards of the old premises; and in order to transfer their business, and practically their license, to their new premises, they applied in their corporate name on the 27th September, 1905, for, and obtained, a certificate signed by two Justices in Petty Sessions to the good character of the Company (4); that their premises had been conducted in a peaceable and orderly manner during the past year, and that

(1) 61 & 62 Vict. c. 46, s. 15 (2) (4).

(2) 43 & 44 Vict. c. 20.

(3) Licensing Act, 1874, s. 8; Beer-houses (Ireland) Act, 1864, 27 & 28 Vict. c. 35, s. 3.

(4) 27 & 28 Vict. c. 35, s. 3; Licensing Act (Ireland), 1874, s. 8; 40 & 41 Vict. c. 4, s. 2.

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their premises had been in the occupation of the Company for upwards of three months, and were rated at £8 per annum. The granting of this certificate was opposed by the prosecutor, District Inspector Cottingham, R.I.C., who obtained from the Court of King's Bench a conditional order for a writ of *certiorari* to bring up and quash this certificate; and counsel on his behalf now move to make the conditional order absolute, mainly on two grounds: first, that the head office of the Company is in the city of Cork, and therefore the Company cannot be said to reside in the Petty Sessions District of Macroom; and, secondly, that the Company is not a "*person*" within the meaning of the Beerhouses Acts, 1864–1877, or the Revenue Acts, 1880 and 1898.

On the first ground, the 13 & 14 Vict. c. 67 was referred to as prohibiting any brewer of beer from selling in any place other than at his licensed brewery premises; but that Act does not prohibit a person who is a licensed wholesale brewer in the city of Cork from being also a licensed wholesale beer-dealer elsewhere; and although the breweries and head office of this Company are in the city of Cork, yet if the Company also lawfully carries on a business as licensed wholesale beer-dealers in Macroom (as in my opinion they may), they have also a residence as a Company in Macroom, where they are known to their neighbours, and are under the immediate observation of the constabulary, to whom statutory notice of intention to apply for such a license or transfer must be given.

The second ground raises the question whether this Company is a "*person*" within the meaning of the Beerhouses (Ireland) Acts and the Licensing Act, 1874. The contention for the prosecutor is, as I understand it, that the whole scope of these Acts as ascertained from the language of the Legislature in the Acts, *ex visceribus actûs* (Co. Litt. 381 b.), points to the individual and personal responsibility of the applicant for a license or transfer of a license, and that it is in this sense his character must be "good"; and that inasmuch as "Beamish & Crawford, Limited," is merely an impersonal incorporated legal entity, it cannot in the nature of things obtain from the Justices a certificate of such good character, and therefore cannot have a wholesale beer-dealer's license. But though this Company is of such impersonal character,

it is competent to employ and act, and practically must employ and act, by and through such individuals as by its constitution it is competent to engage, and engages, for its purposes, and by whose conduct within the scope of their employment the "Company" is bound. A Limited Liability Company is capable of suing, and liable to be sued, in almost every kind of action in the nature of tort or contract. It may be made criminally responsible for most offences which are not punishable solely by imprisonment or corporal punishment. It may be enjoined, and its property may be sequestrated for payment of its debts or fines imposed for offences. Good or bad character is a matter of local or public reputation, and the widest discretion is given by statute to the Justices in respect of their certificate. In *Leader* v. *Yell* (1), where this matter is discussed, Erle, C.J., p. 593, suggests how the words "good character" came to be introduced into the Beer Acts.

I think if the house is conducted in a disorderly way, if convictions are had for breaches of the Licensing Acts, if improper characters are allowed to resort there for improper purposes, or public feeling is outraged by lewd or improper acts knowingly permitted, this "Company" would through their agent or manager, whom they put in charge of or whose omissions or acts they are liable for, have an evil reputation and a bad character; but if, on the contrary, the house is conducted in an orderly and decent manner, the provisions of the Licensing Acts observed, and, perhaps I may venture to add, reasonably good and wholesome beer supplied, the local and public reputation of this Company, through their agent or manager whom this Company placed in charge and for whom they are responsible, would be good, and this Company would be, as the Justices have certified them to be, of good character.

The only remaining contention for the prosecution which it appears necessary to consider is that if the certificate is to be granted by the Justices, it should be granted to the local agent or manager for the Company. This course might be adopted if such agent or manager was, in the opinion of the Justices, a person

(1) 16 C. B. (N. S.) 584.

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suitable for the position, and put by the Company in the exclusive occupation and complete control of the premises and the business for the requisite period (40 & 41 Vict. c. 4), and as between himself and the public, carried on the business in uncontrolled management thereof, although, as between himself and the Company, he was paid a salary for his services, and bound to render accounts to the Company, and to account to them for the profits; see *Nix* v. *Justices of Nottingham* (1). It appears, however, from Humphries' affidavit (par. 4) that the Justices considered this matter, and came to the conclusion that it was more satisfactory the license should be in the name of such a firm as "Beamish & Crawford, Limited," rather than in the name of a clerk or manager, as it would be a better guarantee of the license not being abused if it stood in the name of this Company. I therefore agree that this motion should be refused and the conditional order discharged.

I should add that Mr. Ronan's last point in his argument, viz. the definition of "wholesale beer-dealer's license" in sect. 37 of the Act of 1874 does not, in my opinion, arise for decision in the present case.

KENNY, J.:—

I concur in the Lord Chief Baron's reasons and conclusions, and I merely desire to say a few words with reference to the point glanced at by him towards the close of his judgment, and which I think Mr. Ronan regarded as one of his main contentions, namely, that a brewer of beer is excluded from the category of persons who, under the 8th section of the Licensing Act of 1874, are obliged to obtain a certificate of Justices in order to entitle them to a wholesale beer-dealer's license. His argument was founded on the definition contained in the 37th section of that Act, of a "wholesale beer-dealer's license"—which in terms excepts from its purview a license to a person "not being a brewer of beer". On the words of that definition, it was strongly urged that a brewer was not hit at by the Act at all, and that brewers, notwithstanding the 8th section, continued

(1) [1899] 2 Q. B. 294.

to occupy the same position which they did before the Act. In a sense I agree with the argument, but I consider it inapplicable to the case with which we have to deal. There were two classes of wholesale beer-dealers before the passing of the Act of 1874, viz.—(1) those who brewed beer and sold it wholesale at the brewery premises, and (2) those who dealt in the sale of beer in wholesale quantities, but who were either not brewers at all, or, if they were, sold beer wholesale on premises other than their actual brewery. The repealed Act of 6 Geo. 4, c. 81, the Act of 13 & 14 Vict. c. 67, and the Act of the 43 & 44 Vict. c. 20, which has taken the place of the Act of George so far as brewers are concerned, and others of the licensing Acts, all draw a plain distinction between those two classes. The essential difference has relation to the premises. In the one case the sales are on the premises where the brewing takes place—in the other, on premises occupied and licensed merely for purposes of sale. The brewer of beer pays a license duty in respect of his brewing. The person who, on premises other than a brewery, conducts a wholesale beer trade, also pays a license duty, but one of a wholly different character. A brewer of beer, if he sells beer on premises other than his brewery, must take out the latter license, and thus take up the same position in all respects as if he were not a brewer of beer. In my opinion the exception in the definition clause of the Act of 1874 plainly refers to a person who, being a brewer, takes out a license in respect of his brewing—which license permits a wholesale trade at the brewery concern. If, as I hold it did, the licensing code up to 1874 placed a brewer who sold beer elsewhere than at his brewery in identically the same category and position as any member of the non-brewing community who conducted a wholesale trade, it would be a most unexpected and surprising result of the Act if thenceforth he was to be placed in an exceptional and highly favoured position. If I could give no other effect to the words of the exception than that contended for by Mr. Ronan, I would possibly feel myself obliged to accept it; but inasmuch as there is to my mind a plain and rational meaning that can be attached to these words without causing any disturbance of the pre-existing relations between brewers and non-brewers, I adopt

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that meaning, and regard the words "a license to any person not being a brewer of beer" as referable to a license to a person other than one who (1) is a brewer, and (2) carries on his business of brewing *on the premises in question*. My opinion on this point would therefore be adverse to the contention of Messrs. Beamish & Crawford.

J. G. T.

Appeal. May 3, 4, 7, 9.

The prosecutor appealed (1).

The Solicitor-General (*Redmond Barry, K.C.*) and *Dudley White*, for the appellant:—

A corporation cannot get a license without a certificate from the magistrates, and a certificate of that sort can only be granted to an individual. It would be impossible for magistrates to grant a certificate of good conduct to a corporation.

By 6 Geo. 4, c. 81, s. 2, license duty was established, and every person not being a brewer of beer was to take out a license, and pay £3 3*s*. That Act has been repealed by the Statute Law Revision Act, 1873. Section 6 of 13 & 14 Vict. c. 67 prevented brewers from selling beer in wholesale quantities anywhere except on the premises where they were licensed to carry on their business as brewers, or on premises licensed for the express purpose; but a brewer could get an ordinary license like anyone else. By the Statute Law Revision Act, 1875, portions of sections 6 and 7 of 13 & 14 Vict. c. 67 were repealed, and there was an absolute prohibition against brewers from selling in wholesale quantities outside their brewery premises except to parties who gave them orders. Down to 1874 magistrates were not empowered to deal with the wholesale beer-seller's license. By sect. 8 of the Licensing Act of 1874, it was enacted that it shall not be lawful for any officer of excise in Ireland to grant a wholesale beer-dealer's license to any person, unless such person shall produce the certificate

(1) In the Court of Appeal, before WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

required by sect. 3 of the Beerhouses Act, 1864. By sect. 3 of the latter Act, in order to obtain a license to sell beer by retail to be consumed off the premises, there must be a certificate of good character of the person applying, and also a certificate of the suitability of the premises. Section 4 states the requisites and form of the notice necessary to be served before making the application.

We submit that the person who can make the application must be an individual, and a corporation cannot satisfy the requirements. A corporation cannot give an undertaking, such as is often required in granting a license, as in *Rex* (*Bourke*) v. *Justices of Dublin* (1); nor can it be answerable for penalties which are often imposed: *Leader* v. *Yell* (2). In *Reg.* v. *Lyon* (3) it was stated by the members of the Court of Appeal that a Company could not hold a license itself. *Reg* v. *Jones* (4) does not decide the point, but it was assumed; see also *Co-operative Drapery Company* v. *Bligh* (5). In *Pharmaceutical Society* v. *London and Provincial Supply Association* (6) it was held that the word "person" in the Pharmacy Acts of 1868 did not apply so as to make a corporation liable for penalties. "Person" in the Dentists Act, 1878, relates only to individuals and not to a corporation: *O'Duffy* v. *Jaffe* (7). Moreover, there are several sections in the Licensing Code which show that the legislation cannot apply to a corporation, *e.g.*, 8 & 9 Vict. c. 64, s. 2; 27 & 28 Vict. c. 35, s. 7; 37 & 38 Vict. c. 69, ss. 13, 14, and 29.

Residence can only apply to individuals; but even if it applies to a corporation, the residence of this Company is Cork: *Aberystwith Pier Company* v. *Cooper* (8); *Reg.* (*Gilbey*) v. *Justices of Fermanagh* (9); Stroud's Jud. Dict., 1731. If a proper notice was not served, there was no jurisdiction to grant a license.

(1) [1903] 2 I. R. 440.
(2) 16 C. B. (N. S.) 584.
(3) 14 *Times* L. R. 357.
(4) 59 J. P. 87.
(5) 66 J. P. 216.
(6) 5 App. Cas. 857.
(7) [1904] 2 I. R. 27, 33.
(8) 14 W. R. 28.
(9) [1897] 2 I. R. 559.

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Ronan, K.C., and *Jefferson*, for the respondents:—

We submit (1) that sect. 8 of the Licensing Act, 1874, does not apply to the respondents; and (2) if the Court is against us on that, then, a corporation being entitled to get this license before the Act, there is nothing to prevent a corporation getting this license now. By sect. 37 of the Licensing Act, 1874, a "wholesale beer-dealer's license" is defined to be "a license to any person *not being a brewer of beer*," authorising the sale of beer, &c. The Act of 1874 divides people into two classes—brewers and non-brewers. The brewers' right is to get the license on paying the money. That right is not interfered with. The respondents have the right to sell beer by common law, and it rests with the appellant to show any Act taking it away. This license was not necessary at all: *Williamson* v. *Norris* (1). If the certificate is worthless, a writ of *certiorari* ought not to issue.

As to the question of residence—a Company may be considered as resident not only where its principal place of business is, but wherever it has any place of business; for some purposes a Company may have more residences than one: Lindley on Companies (6th ed.), 54. Residence in the case of an individual is where a person has his ordinary place of business, and where he is to be found during the working hours of the day: *Reg.* (*Gallagher*) v. *Justices of Tyrone* (2). The residence of an individual may be different from that of a corporation.

But if the Court is against us on the first branch of the argument, then we submit that a corporation is entitled to get the certificate from the magistrates, because a corporation can have a character, and be capable of good or bad conduct. A corporation can sue for libel: *South Hetton Coal Company* v. *North-Eastern News Association* (3); and it can be guilty of malice: *Citizens Life Assurance Company* v. *Brown* (4).

The judgment of the Court of Appeal (Walker, C., and Fitz-Gibbon and Holmes, L.JJ.) was delivered by—

(1) [1899] 1 Q. B. 7.
(2) [1901] 2 I. R. 497.
(3) [1894] 1 Q. B. 133.
(4) [1904] A. C. 423.

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HOLMES, L.J.:—

Beamish & Crawford, a Limited Liability Company, carrying on the business of brewing beer in Cork, applied to the Justices at Petty Sessions in Macroom for the certificate prescribed by sect. 8 of the Licensing Act, Ireland, 1874, as a preliminary to obtaining a wholesale beer-dealers' license for premises situate in that town, and the certificate having been given, the object of the present proceedings is that it be quashed, on the ground that the Justices have no jurisdiction to grant such a certificate to a corporate body.

To this proposition Mr. Ronan offers two answers. In the first place, he says that sect. 8 does not apply to brewers, that the certificate was without value for any purpose, and that, although he has no objection to its being quashed, the Court ought not to interfere with a perfectly worthless document. He argues, secondly, that even if the section is applicable to brewers, his clients were not prevented from obtaining their certificate by their incorporation, and that, therefore, there was no excess of jurisdiction in granting it.

Of these two propositions, the first is comparatively unimportant, and, I think, easy of solution. To decide the second seems to me to be a matter of great difficulty, and involves considerations not confined to the rights of bodies corporate in regard to wholesale beer-dealers' licenses but also relating to their rights to obtain licenses for the sale of intoxicating liquors by retail. In fact, if we were to accept the whole of Mr. Ronan's argument on this branch of the case, it might alter what I understand has been the practice in the administration of the licensing laws in every part of the United Kingdom.

Moreover, in strict logical sequence, the validity of a certificate ought to be considered after it has been determined that a certificate is necessary; and, for every reason, I would prefer to take this course if there is no legal objection thereto.

Two members of the Divisional Court offered no opinion on Mr. Ronan's first point, on the ground that it was not raised by the conditional order. This would be a good reason for not allowing the prosecutor to rely on it; but I think it ought not to preclude the defendants from using it for their defence. I, therefore, proceed to consider it.

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Section 8 of the Act of 1874 provides that no Excise officer shall grant a wholesale beer-dealer's license to any person, unless such person shall produce a certificate to the effect, and as required by sect. 3 of the Beerhouses (Ireland) Act, 1864. Section 37 enacts that a wholesale beer-dealer's license shall mean a license to any person, not being a brewer of beer, authorising the sale of strong beer only in casks containing not less than 4½ gallons, or in not less than two dozen reputed quart bottles, at one time. Now, if Beamish & Crawford, Limited, be "a brewer of beer" within the meaning of this definition, it seems plain from the words I have read that sect. 8 does not apply to them.

The argument for the prosecutor is that a wholesale beer-dealer's license given to a brewer for premises, other than the premises in which he carries on the brewing business, is not given to him as a brewer; and in taking out such license he is not a brewer within the meaning of that word as used in the definition. I can find nothing in the Act of 1874 to justify this construction; and the only enactment referred to in support of it is 13 & 14 Vict. c. 67, sections 6 and 7.

Before that Act was passed, although wholesale beer-dealers' licenses of the kind now in use were in existence, a brewer of beer for sale was not required to have such a license as a condition to selling beer by wholesale in the brewery premises. He sold beer therein by virtue of his brewer's license; but a practice had grown up of brewers selling beer in other premises without any license save the ordinary brewer's license, and doubts were entertained as to the duties and liabilities incurred by brewers by reason of such practice.

The 6th and 7th sections of the Act of 1850 were passed, as appears from their preamble, to remove these doubts. The 6th section provides that while, under the brewer's license, beer may be sold by wholesale on the brewery premises, similar sales in other premises belonging to the brewer must be under a distinct and separate license. The 7th section then proceeds as follows:—"Provided always, that it shall be lawful for any brewer of beer to take out any separate license or licenses for the sale or retail of beer at any other place than the premises in which he shall be licensed to exercise and carry on the trade or business of a brewer

. . . and such brewer, so far as regards the sale, or the license to be taken out for the sale, by him of beer at any other place than such last-mentioned premises, shall be on the same footing as, and shall be deemed and held to be, a person not being a brewer of beer."

I presume that this provision was inserted lest it might be held that the holder of a brewer's license ought not to be given the ordinary licenses for the sale of beer in premises other than the brewery, and for the purpose of making it clear that he would have the same right as any other member of the public to obtain licenses for such sale elsewhere.

This clause, which was repealed by the Statute Law Revision Act of 1875, is relied on to give the peculiar construction contended for by the prosecutor to the definition of wholesale beer-dealer's license in the Act of 1874. It would, under any circumstances, be difficult to establish the proposition that a statutory provision such as this may be used to modify or alter the clear language of an Act passed twenty-four years later, and dealing with a different subject. In the present case it is impossible. The words now run—"wholesale beer-dealer's license shall mean a license to any person not being a brewer of beer authorising the sale," &c. The prosecutor wishes to add thereto—"in his brewery." But this addition makes the exception of a brewer meaningless. A brewer did not in 1874, and does not now, sell beer wholesale in his brewery under a wholesale beer-dealer's license; he sells under his brewer's license.

The suggested modification would leave no subject-matter for the exception to operate on. I am, therefore, of opinion that I must interpret the words in their clear and natural sense. The Lord Chief Baron was of opinion that the result of holding this would be that the certificate ought to be quashed; and Mr. Ronan does not object to this. I am, however, disposed to think that the proper course in a case like the present is to discharge the conditional order.

When a document, although purporting to be a judicial act, affects no right, carries with it no liability, and is to all intents and for all purposes valueless, nothing is gained by the issue of a writ of *certiorari*. I have known it refused on this ground when

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I was a Judge of the High Court, and, if I mistake not, we have recently acted on this principle in affirming an order of the King's Bench Division.

I desire to add that the partial repeal of sections 6 and 7 of the Act of 1850 by 34 & 35 Vict. c. 111, and by the Statute Law Revision Act of 1875, is unsatisfactory in form.

There is some ground for the contention of the Solicitor-General, that what is left of these sections seems to say that a brewer is only entitled to sell beer in the premises where his brewing business is carried on, and that he cannot obtain a license to sell it in other premises. If this be the true construction, it does not help the relator. It would follow that he is wholly outside the provisions of sect. 8. But Mr. Ronan is prepared to run this risk, and I think that he is not too confident. The sections in their amended form would probably be held not to go further than to prevent a brewer from obtaining a license for sale of beer by retail; but this matter is not now before us.

For these reasons I hold that the writ of *certiorari* ought not to issue, and I therefore concur in the order of the Divisional Court, although I have arrived at this conclusion for different reasons.

Solicitor for the appellant: *The Chief Crown Solicitor.*
Solicitor for the respondents: *A. Julian.*

R. D. M.

MECREDY *v.* BROWN.

(1906. No. 17.)

K. B. Div. Probate. 1906.

April 23, 24. May 14.

Appeal. June 20.

Probate—Practice—Citation to see proceedings—Compromise—Minor (not a party) appearing at trial bound by result.

An action was brought by the executors of a testator to establish a will against four of his next-of-kin. Two others, next-of-kin and legatees, one of whom was a minor, aged sixteen years, entered caveats, and were cited to see proceedings. They entered appearances, but the solicitor who entered the caveat and an appearance for the minor did not state in either that she was a minor. The remaining next-of-kin entered an appearance as an intervenient. At the trial a compromise was entered into with three of the defendants who withdrew their pleas in opposition to the will on terms, and the trial proceeded against the fourth defendant, who had served notice to cross-examine only, and resulted in a verdict and judgment for the plaintiffs, establishing the will. The cited parties were represented at the trial by counsel and solicitor, the minor did not apply for leave to intervene, and the action was allowed to proceed without objection. They made no application for a new trial, but brought an action against the executors to establish an earlier will, under which they would take somewhat larger legacies than under the will which had been established:—

Held, on a motion by the executors to stay the second action, that the plaintiffs were bound by the result of the first action, and that the second action must be stayed, and that the minority of one of the plaintiffs made no difference.

MOTION. The facts of the case are stated in the headnote and judgment.

Matheson, *K.C.*, and *Leech*, for the defendants, in support of the motion.

Jefferson, for the plaintiffs.

The following authorities were referred to, in addition to those mentioned in the judgment: *Norman* v. *Stains* (1); *In re*

(1) 6 P. D. 219.

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Birchall (1); *Rhodes* v. *Swithenbank* (2); *Young* v. *Holloway* (3); *Ryan* v. *Ring*; *Lannen*, *Intervenient* (No. 2) (4); Tristram and Coote's Probate Practice (13th ed.), p. 355.

ANDREWS, J.:—

This was a motion on behalf of the defendants that all further proceedings in this action should be stayed. The facts as appearing from the affidavits and documents used on the motion are as follows:—

On the 30th of March, 1905, Frederick Robert Brown and James Rendell (the defendants in the present action) brought an action against four of the next-of-kin of Angel Atkinson, deceased (namely, Thomas John Atkinson, Elizabeth Catherine Ridgway, Andrew Lyster Atkinson, and George Thomas Andrew Atkinson), to establish the last will of the said Angel Atkinson, dated the 5th November, 1901, and a codicil thereto, dated the 12th March, 1904, of which Messrs. Brown and Rendell (the plaintiffs in that action) were the executors. In July, 1905, the first three defendants in that action pleaded to the statement of claim which propounded the said will and codicil—1, want of due execution thereof; 2, want of capacity in the deceased; and 3, want of knowledge and approval by her of the contents thereof; and the fourth defendant, by a separate defence, pleaded the same pleas. On the 9th November, 1905, Mr. James Cooper, solicitor, entered two caveats in the Goods of the said Angel Atkinson, deceased, one on behalf of Robert John Mecredy (a plaintiff in the present action) and Ellen E. M. H. Mecredy, and the other on behalf of Angel Marion Atkinson (the second plaintiff in the present action, in which she is called Angel Atkinson). The caveat on behalf of Angel Marion Atkinson did not state that she was a minor. Mr. Jameson, as solicitor for the executors, who were plaintiffs in the first action on the 12th February, 1906, issued a citation to see proceedings in that action addressed to the said Robert John Mecredy and Angel Marion Atkinson, or their solicitor, which, following the usual form, gave the plaintiffs in the present action

(1) 16 Ch. D. 41.
(2) 22 Q. B. D. 577.
(3) [1895] P. 87.
(4) 25 L. R. Ir. 186.

notice to appear in the first action either personally or by their solicitor, should they think it for their interest so to do; and on the same day the plaintiffs in the first action obtained an order giving them leave to serve the citation to see proceedings by serving Mr. Cooper, the solicitor for the caveators. Mr. Cooper attended on the making of this order, to which there was no objection, and accordingly on the 20th February, 1906, Mr. Cooper, as their solicitor, entered an appearance in the first action to the citation to see proceedings for the plaintiffs in the present action, and the other caveator I have referred to, and on the same day gave notice thereof to the plaintiffs in the first action. Neither the entry of appearance, nor the notice thereof, stated that Angel Marion Atkinson was a minor. Mr. Cooper, as solicitor for the caveators, had notice of the summons to fix the time and mode of trial of the first action, before which Robert John Mecredy had also entered an appearance therein as an intervenient. It was competent to Angel Marion Atkinson to have also become an intervenient, and both the plaintiffs in the present action could, as intervenients, have applied for leave to plead in the first action, had they desired to do so. Although it is the practice of the Court not to allow actual interference at the trial of a probate action by persons who have not pleaded, it is competent to either intervenients, or parties cited to see proceedings, who have appeared in the action, but have not pleaded, to call the attention of the Judge to anything which may occur in the course of the trial which, by altering its ordinary course or otherwise, renders it necessary or important for them for the protection of their interests to obtain leave to actively intervene, and the Judge may give such leave, if he considers that the due protection of their interests requires that it should be granted. The reason for citing interested persons to see proceedings in a probate action is to give them express notice of it, and bring them into privity with it, and so enable them, if they wish to do so, to appear and intervene and obtain leave to plead; and, whether they obtain such leave or not, to attend at the trial, and see that their interests are protected.

The trial of the first action came before Mr. Justice Johnson upon the 21st February, 1906. The plaintiffs in the present action had not applied for leave to plead, but they were repre-

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sented at the trial by their counsel and solicitor. The fourth original defendant in the first action (George Thomas Andrew Atkinson) had served notice of his intention only to cross-examine the witnesses for the plaintiffs. When the jury were sworn, the counsel for the first three original defendants made an offer in Court to the plaintiffs' counsel, which he asked for and was allowed time to consider, and this resulted in these three defendants agreeing to withdraw opposition to the will and codicil propounded, on the terms of the residuary legatee increasing the legacies, to which two of them were entitled thereunder by £75 each, and paying £150 in discharge of the costs of these three defendants.

This agreement was reduced to writing, and made a rule of Court. Its precise terms were not communicated to the plaintiffs in the present action, as the parties to it, viz., the plaintiffs, the residuary legatee, and the first three original defendants in the first action, regarded it as affecting them only; but counsel for the plaintiffs in the first action then proceeded to state their case (as the fourth original defendant was not a party to this agreement), and explained that the residuary legatee had agreed to make a small increase in the legacies of two of the defendants, and to give a sum for costs. It thus became known to the counsel and solicitor who appeared for the plaintiffs in the present action that the opposition by three of the defendants to the will and codicil propounded was withdrawn. Four witnesses were then called, and examined in support of the will and codicil, and were cross-examined by counsel for the fourth original defendant. No objection was taken on behalf of the plaintiffs in the present action, and no application was made on their behalf for leave to actively intervene. They allowed the trial to proceed without objection, and it resulted in a verdict by the jury, and judgment by the Court establishing the will and codicil propounded. The registrar's certificate of the result of the trial states, in accordance with the facts, that the first three original defendants withdrew their pleas, and the action proceeded against the fourth original defendant on the plea filed by him. Mr. Cooper, in his affidavit sworn on the 18th April, states (paragraph 2) that the plaintiffs in the present action had not "any

knowledge whatsoever" of the above compromise. I do not think he intended to go so far as these words might appear to convey, for it was not only apparent but was stated that a compromise had taken place. He also states (paragraph 4) that counsel had advised him and his clients "that, according to the practice and rules of the Probate Division, they could not take any part in the trial, and had no *locus standi* whatsoever either to examine or cross-examine any witnesses, and therefore counsel on behalf of the plaintiffs in this action were not briefed to fight the action on their behalf, and no pleadings of any kind were put on the file by the plaintiffs in this action in the former action." But counsel, instructed by Mr. Cooper, attended at the trial on behalf of the plaintiffs in the present action, and once a change occurred in the course of the trial, as it did, it was perfectly open to the counsel for the plaintiffs in this action to apply for leave to actively intervene on their behalf, if it was thought necessary or important to do so for the protection of their interests; in place of which with knowledge that a compromise had taken place, which resulted in the first three original defendants withdrawing opposition to the will and codicil propounded, the trial was allowed to proceed, and a verdict and judgment to be given establishing the will and codicil, without any application or objection on behalf of the plaintiffs in this action, who have made no application for a new trial of the first action, either on the ground of surprise, mistake, after-discovered evidence, or otherwise, but have instituted a new action with a view to indirectly reverse the verdict and judgment in the first action, in which they appeared as parties cited to see proceedings, and were represented by counsel and solicitor. They have given no information which would enable the Court to form an opinion whether the evidence which Mr. Cooper states in his affidavit they have discovered since the former trial is such as to afford even a reasonable prospect of reversing the verdict and judgment obtained thereat; but even if such evidence has been discovered, the proper and regular course, in my opinion, would have been to have applied for a new trial of the first action, the propriety of granting which, and the grounds on which it was asked for, would have been fully investigated on such an application. I have no sufficient materials on the present

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application to determine whether the plaintiffs in the present action would have been entitled to an order setting aside the verdict and judgment already had, and directing a new trial of the first action.

As regards Robert John Mecredy, one of the plaintiffs in the present action, I entertain no doubt that he ought not to be allowed to proceed with it; and that, even if this were an application for a new trial of the first action, he has not shown sufficient grounds for granting it.

The same would apply to Angel Marion Atkinson, the other plaintiff in the present action, unless her minority makes a difference in her favour.

It is true that no guardian *ad litem* was formally appointed for her, but her solicitor, neither in the caveat, nor the appearance to the citation on her behalf, nor in any other proceeding in the first action, gave any intimation that she was a minor. It appears that she is about sixteen or seventeen years of age, and, according to probate practice, she was entitled to elect a guardian. Her father, with whom she resides, is her natural guardian, and is the person she would have most properly elected as her guardian *ad litem*. He is a solicitor. I am satisfied that he was in fact looking after her interests, and that Mr. Cooper was acting as her solicitor with his knowledge and approval, and he was present in Court throughout the trial, as also was her co-plaintiff, Robert John Mecredy. Everything was done on behalf of Angel Marion Atkinson which would have been done if the formality of appointing a guardian *ad litem* had been observed on her behalf. She had her father in attendance to guard her interests, and she was represented by counsel and solicitor. Everything that took place would have occurred had the formality of appointing a guardian *ad litem* been observed on her behalf, which it lay on those acting for her to have observed, and, in my opinion, she had a guardian *ad litem* in fact. A citation to see proceedings, as I have already stated, is to give notice of the proceedings to the person cited, who is at liberty to appear, but cannot be compelled to appear in the action. Even before the citation was served, however, her interests were protected by the caveat which was entered on her behalf by Mr. Cooper as her solicitor; and even if in strict-

ness the rules applicable to the appointment of a guardian *ad litem* ought to be held to apply to a minor cited to see proceedings, I do not think that, under the special circumstances of this case, Angel Marion Atkinson, who had all the protection of a guardian *ad litem* in fact, ought to be allowed to get rid of what I would regard as the otherwise binding effect upon her of the result of the first trial by relying on the absence of the formality of appointing a guardian *ad litem* for her which should have been observed on her behalf.

This is not like the case of *Fitter & Co.* v. *Tuke* (1), in which the infancy of the defendant went to the root of the action. The first action in the present case was properly constituted, and notice thereof was properly given to the cited parties, who by entering caveats had secured their obtaining notice. I may also observe that such Probate practice as has not been altered by the existing Superior Court rules remains, and in the case of *Kelly* v. *Dunbar* (*Clibborn, a Minor Intervenient*) (2), Judge Keatinge said in his judgment, which I have not found reported elsewhere:— "I think it right to say that I consider a minor is entitled to no more indulgence than an adult, if properly served with citation. Minors should be served so as to secure a proper attention to their interests, but if they are duly served, in my opinion, they will be bound as adults in other cases." If it were otherwise, much of the protection which citations to see proceedings are intended to give against further litigation might be impaired, and it would not seem desirable to cast on the party issuing the citation the obligation of ascertaining (which he might in many cases find it difficult and in some almost impossible to do) whether the cited party was or was not of full age.

The present action has been brought in reality to reverse the result of the first action, and have the will and codicil which were established by it condemned, though the indorsement on the writ in the present action is not very expressly framed for that purpose; there are, it appears, several wills of the deceased prior in date to the will and codicil which have been established, and under some of these prior wills, if proved, the plaintiffs in the present action

(1) 40 Ir. L. T. R. 1. (2) 10 Ir. Jur. (N. S.) 151.

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would take somewhat larger legacies than those to which they are entitled under the will and codicil which have been established. It is by reason of this interest, and not as next-of-kin, that they seek to proceed with the present action, so as, if they could get rid of the will and codicil which have been established, to endeavour to establish some earlier will under which they would take somewhat larger legacies. Had they so thought fit, they could, in the first action, have got leave to plead, and not only impeach the will and codicil which were propounded therein, but propound any earlier will or wills.

The general rule is settled that it is not necessary in the Probate Court that a person should be a party to a suit in order that he should be bound by the result. If he is privy to the proceedings, it is sufficient. *In Ratcliffe* v. *Barnes* (1) Sir Creswell Creswell said :—"The general principle, as I called it, is this, that where a party has had full notice, and has had the opportunity of availing himself of the contest, he will be bound by the decision"; and he referred to this as having been expressly decided by a very learned Judge, Sir John Nicholl. This rule is also referred to by Lord Penzance in *Wytcherley* v. *Andrews* (2) thus :—"There is a practice in this Court by which any person having an interest may make himself a party to the suit by intervening, and it was because of the existence of that practice that the Judges of the Prerogative Court held that if a person knowing what was passing was content to stand by, and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to reverse the case." The rule, no doubt, is not applicable to cases of compromise without the knowledge of the party who has notice of the proceedings, and who does not know that the suit was not proceeding in its regular course. In that respect the cases of *Wytcherley* v. *Andrews* (2) and *Ritchie* v. *Malcolm* (3) differ from the present case, in which, although there was a compromise with three of the defendants in the first action, the plaintiffs in the present action knew that a compromise with these defendants had taken place, and, though represented by counsel and solicitor at the trial, they allowed the action to proceed against the other

(1) 2 Sw. & Tr. 486. (2) L. R. 2 P. & D. 328. (3) [1902] 2 I. R. 403.

defendant without objection; and they have never sought to directly impeach the verdict and judgment given in that action, in which they appeared, by applying for a new trial. I am therefore of opinion that the plaintiffs in this action are bound by the result of the first action, and that their present action ought not to be allowed to proceed.

The order will be that all further proceedings in the present action be stayed, and that the plaintiffs in this action pay to the defendants in this action their costs of this motion.

W. L.

Appeal. June 20.

The plaintiffs appealed (1).

Littledale, K.C., and *Rynd*, for the appellants.

Matheson, K.C., and *Leech*, for the respondents, were not called on.

THE COURT OF APPEAL affirmed the decision of Andrews, J.

Solicitor for the plaintiffs: *J. Cooper.*
Solicitor for the defendants: *E. C. Jameson.*

R. D. M.

(1) In the Court of Appeal, before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L.JJ.

K. B. Div. 1906. May 18.

THE KING (BURKE) *v.* CHAIRMAN AND JUSTICES OF GALWAY (1).

Certiorari—*Quarter Sessions—Affirmance of conviction at Petty Sessions—Unspeaking order—Trespass in pursuit of game.*

Where, on appeal from a conviction at Petty Sessions for trespass in pursuit of game, the Chairman and Justices at Quarter Sessions simply affirmed the conviction with costs:—

Held, that *certiorari* would not lie to bring up to be quashed the order of Quarter Sessions.

Jurisdiction of the King's Bench Division over an appellate order of Quarter Sessions, which neither recites the evidence on which it is founded nor states a case, considered.

The Overseers of Walsall v. *London & North-Western Railway Co.* (4 A. C. 30) applied.

CERTIORARI.

William Burke, the prosecutor, was served with a summons, at the suit of William S. Waithman, to appear at Galway Petty Sessions to answer a complaint that he did "unlawfully and wilfully commit a trespass on the land of Coarsefield, . . . in search and pursuit of game." From an affidavit filed on behalf of the prosecutor, it appeared that at the Petty Sessions it was proved that Burke was seen on the lands of Michael Casserly, at Coarsefield, with a retriever dog and gun. It was not alleged that he had fired a shot; but it was proved that game was seen there on other occasions; and it was admitted that wild geese frequented the place in large quantities. For the defence, it was proved or admitted on cross-examination that the complainant was not lessor or landlord of the lands, and had merely a right of shooting over those lands, and that it was merely as a common informer his name was used as complainant in the summons. He was in America at the time the summons was issued, and admitted at the appeal that

(1) Before PALLES, C.B., and JOHNSON, JJ.

he knew nothing whatever about the complaint, nor did he authorise the summons to be issued, or know anything whatever about it until the hearing of the appeal, nor did he give any information whatever about the matter; but, on the appeal, he approved of the prosecution. It was proved on behalf of the defendant that he was accustomed to visit these lands at the request of several adjoining tenants who held judicial leases, many of whom signed a document giving permission to the defendant to shoot on their holdings.

It was further proved on behalf of defendant that he was several times invited to these lands to destroy wild geese, which were proved to have frequented the tenants' lands in very large numbers. Several hundreds of wild geese might be seen feeding there at times, and they did much injury to crops or young grass, and it was to try and prevent this injury the tenants requested the defendant to come on their lands to shoot them.

It was not alleged by the complainant that the defendant had fired a shot or killed anything that day, or that any game had been found in his possession. It was contended on behalf of the defendant that, as the complainant was neither lessor nor landlord and had no right, save the right of shooting, he could only prosecute as a common informer, and, being in America at the time the summons was issued and tried before the magistrates, it could not be held that he was a common informer.

The Justices at Petty Sessions convicted Burke, and ordered him to pay a fine of 20*s*., or in default to be imprisoned for fourteen days. Upon appeal, the Chairman and Justices at Quarter Sessions, on 20th February, 1906, affirmed the Petty Sessions order with 20*s*. costs. A conditional order for a writ of *certiorari* was obtained on the grounds:—

1, That the orders and convictions of both Petty Sessions and Quarter Sessions were made without and in excess of jurisdiction; 2, that William S. Waithman was not lessee of the shooting, or lessor or landlord of the lands, and that he could not be a common informer, being absent from the country when the offence was alleged to have been committed; 3, that there was no evidence that the defendant was in pursuit of game; and 4, that the order was bad on its face, as it awarded

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costs. The conditional order directed that, even if cause were not shown, the order was not to be made absolute without a further order of the Court. A cause affidavit was filed late, and consequently was not permitted to be used in the argument.

Dickie, for the prosecutor, moved to make the conditional order absolute.

Henry, K.C., for the complainant in the Court below, *contra.*

PALLES, C.B. :—

The first objection relied upon by Mr. Dickie is that there was not evidence sufficient to sustain the conviction. There was, however, an appeal to Quarter Sessions; and that Court affirmed the conviction. The *effective* determination, therefore, is that of the latter Court, and we cannot quash the proceedings unless we are of opinion that *that determination* was without jurisdiction.

There was, admittedly, jurisdiction in the Quarter Sessions to enter upon the inquiry; and it is not suggested that jurisdiction is not shown on the face of the proceedings. A case has not been stated; nor has the evidence been stated or referred to in the Quarter Sessions order, so that it is not "a speaking order," to use the words of Earl Cairns, L.C., in *The Overseers of Walsall* v. *London & North-Western Railway Company* (1). That case (the most authoritative decision of modern times as to the true nature of the jurisdiction of this Court in relation to orders of Quarter Sessions made in exercise of its appellate jurisdiction) is an authority binding on us, that, under such circumstances, the order is conclusive, and cannot be reviewed on *certiorari.* It is true that the order of Quarter Sessions there under consideration was one in relation to the validity of a rate; but the decision was not founded upon anything peculiar to rating appeals. It was based upon the Common Law jurisdiction of this Court. The jurisdiction of the King's Bench to bring up and examine on *certiorari* orders of Quarter Sessions made in the exercise of their appellate jurisdiction is the same identical Common Law jurisdiction, whatever may be the source of the particular appellate jurisdiction of the

(1) 4 A. C. 30.

Quarter Sessions under which the order sought to be brought up purports to be made. Although the appellate jurisdiction of the Quarter Sessions must necessarily be statutable, the jurisdiction of this Court to review the proceedings of the Quarter Sessions is the old Common Law jurisdiction of the King's Bench, to keep inferior Courts within the limits of their jurisdiction; and everything that was said in the House of Lords in the above case is as applicable to the matter here as it was in the case then before the House. There Earl Cairns says (1), in reference to the jurisdiction of the Court of Quarter Sessions as to a rate—

> "As it seems to me, that jurisdiction may be stated very shortly; and there is really—I say it after hearing all that has been said on both sides—little or no controversy upon the subject. The Court of Quarter Sessions was, in the first instance, the Court of Appeal before which objections to rates of this kind were to be brought. When the Court of Quarter Sessions had determined a rate, that determination was, as a general rule, *final on the merits*. There was no Court of Appeal in the ordinary sense of the term, before which *the facts* upon which the Court of Quarter Sessions had proceeded could be brought up by way of review. But the Court of Quarter Sessions, like every other inferior Court in the kingdom, was open to this proceeding: if there was, *upon the face of the order* of the Court of Quarter Sessions, anything which showed that that order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it, and to look at the order and view it *upon the face of it*, and if the Court found *error upon the face of it*, to put an end to its existence by quashing it."

He then proceeds to show how the Quarter Sessions legally could render, and were in the habit of rendering, their decision on a question of law reviewable—

> "All that was necessary was that the Court of Quarter Sessions, in making its order, should not make it in an unspeaking or unintelligible order, but should in some way state *upon the face of the order* the elements which had led to the decision of the Court of Quarter Sessions. If the Court of Quarter Sessions stated upon the face of the order, by way of recital, that the facts were so-and-so, and the grounds of its decision were such as were so stated, then the order became, *upon the face of it*, a speaking order; and if that which was stated *on the face of the order*, in the opinion of any party, was not such as to warrant that order, then that party might

(1) 4 A. C. 39.

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THE KING (BURKE) *v.* JUSTICES OF GALWAY.

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go to the Court of Queen's Bench, and point to the order as one which told its own story, and ask the Court of Queen's Bench to remove it by *certiorari*, and, when so removed, to pass judgment upon it whether it should or should not be quashed."

So, too, Lord Penzance said (1)—

"The Court of Queen's Bench exercised the same jurisdiction . . . of quashing any order of a Court of Quarter Sessions *for any insufficiency which appeared on the face of it.* Of course, until the Court of Quarter Sessions set out some facts *upon the face* of their orders, the Court of Queen's Bench could not interfere with them, *except upon matters of form.*"

The decision in *In re Russell* (2) logically followed from the above decision of the House of Lords.

The distinctions drawn by Lord Cairns, by the words *final on the merits*, and by Lord Penzance, who excepts "matters of form," were undoubtedly intended to exclude from their judgments the cases we so frequently have before us, especially under the Licensing Acts, in which the adjudication of Quarter Sessions is impeached when, through some error of form, that Court had not jurisdiction to enter upon the inquiry. The absence of that jurisdiction in the Quarter Sessions can always be shown. Such was the case of *Rex* (*Roe*) v. *Justices of Roscommon* (3). There the order brought up was one of Quarter Sessions, which was made upon appeal from Justices who had refused the applicant a certificate to enable her to continue her business as a publican, upon the ground that the house had not, during the current year, been conducted as a public-house. The Quarter Sessions was of opinion that it had been so conducted for the necessary period. It had previously been held by the Court of Appeal that the fact of the licensed house having been during the current year conducted as a public-house was an essential preliminary to the jurisdiction of Justices at Petty Sessions, or of the Court of Quarter Sessions, granting such a certificate. The prosecutor there sought to quash the order of the Quarter Sessions granting the certificate, upon the ground that there was no evidence to support the decision of the Quarter Sessions that the house had, during the requisite period, been

(1) 4 A. C. 44. (2) 22 L. R. Ir. 487. (3) [1905] 2 I. R. 101, 112.

conducted as a public-house. It was objected by the counsel for the publican that, as the decision of the Quarter Sessions had been made in the exercise of an appellate jurisdiction, this question was, upon the authority of *In re Russell* (1), not open for consideration. The Solicitor-General (2) rightly insisted, "This is not matter of merits, but is matter preliminary to the jurisdiction of the Justices." The Court decided that they could consider whether there was evidence before the Quarter Sessions upon that matter. No other decision would have been possible. They might have considered even the weight of the evidence touching such a preliminary point. The decision there is in no wise inconsistent with that of the House of Lords in *Walsall* v. *London & North-Western Railway Company* (3), by which they were bound, and to which they do not refer, nor with that of *In re Russell* (1), of which, no doubt, they express their disapproval.

So, too, in each of the six cases mentioned in the judgment in *Rex* v. *Justices of Roscommon* (4) in support of the decision there, the matter upon the absence of which the decision of the Quarter Sessions was sought to be impugned was preliminary matter essential to the existence of jurisdiction in the Court to enter on the inquiry.

I therefore hold that the first objection fails. As to the second, it, too, arises upon the evidence, and is not cognizable by us.

The conditional order must be discharged; but, as cause was not shown, without costs.

JOHNSON, J., concurred.

Solicitor for the prosecutor: *H. M. Murphy.*
Solicitors for the complainant: *Blake & Kenny.*

J. L.

(1) 22 L. R. Ir. 487.
(2) [1905] 2 I. R. 113.
(3) 4 A. C. 30.
(4) [1905] 2 I. R. 101, 112.

Appeal.
1906.

June 19.

In re BIRT, an Arranging Debtor (1).

Bankruptcy—Arrangement—Refusal of debtor to sign composition notes—Contempt—Attachment.

B. presented a petition for arrangement, by which he proposed to pay his creditors 10*s.* in the £1, in four instalments of 2*s.* 6*d.* each, the first of said instalments to be paid in cash within one month from the confirmation of the offer by the Court, and the other instalments of 2*s.* 6*d.* each to be paid in three instalments at five, nine, and twelve months, respectively, from the acceptance of the proposal by the Court, to be secured by the joint and several promissory notes of the debtor and a surety. The offer was accepted and confirmed by the Court, by order dated the 27th March, 1906, and by the same order B. was ordered to lodge with the Official Assignees the money and composition notes before the 27th April. On the 13th March the surety signed a consent to perform the proposal, and the consent was made a rule of Court.

B. failed to pay the 2*s.* 6*d.* in cash, owing to his inability to recover some debts that were due to him, and he refused to sign the composition notes. On the 29th May an order was made that B. should sign the notes, and as he still refused to do so, an order was made to attach him for his contempt.

On the 29th May B. filed a petition for adjudication against himself. On the 1st June the petition was heard, and an order was made refusing to adjudicate B. bankrupt:—

Held (reversing the decision of Boyd, J.), that once the debtor failed, through no culpable default of his own, to pay the first instalment in cash, the entire arrangement failed; that the debtor should not have been ordered to sign the composition notes; and that he should be adjudicated bankrupt.

Re M. & R. (30 I. L. T. R. 137) considered.

Appeal by the petitioner, Michael Birt, from an order of Boyd, J., dated the 1st June, 1906, refusing to adjudicate the petitioner bankrupt, and one dated the 5th June, for attachment. On the 12th February, 1906, Birt presented a petition to the Court of Bankruptcy for arrangement with his creditors, by which he proposed to pay them 10*s.* in the £, payable in four instalments of 2*s.* 6*d.* each, the first of said instalments to be paid in cash within one month of the confirmation of the offer

(1) Before Sir Samuel Walker, C., and FitzGibbon and Holmes, L.JJ.

by the Court, and the other instalments of 2*s.* 6*d.* each, to be paid in three equal instalments at five, nine, and twelve months, respectively, from the acceptance of the proposal by the Court, said three instalments to be secured by the joint and several promissory notes of the debtor and one Philip Quigley. At the second private sitting the offer was accepted and confirmed by order of the Court, dated the 27th March, 1906; and by the same order Birt was ordered to lodge with the Official Assignee the money and composition notes before the 27th April. On the 13th March, 1906, Quigley signed a consent to perform the proposal, which was made a rule of Court.

Birt failed to pay the first instalment of 2*s.* 6*d.*, owing, as he said, to his inability to collect the debts due to him, and he refused to sign the composition notes. On the 29th May, 1906, an order was made that Birt should sign the composition notes for payment of the last three instalments of his composition, and an application that the surety should sign the notes was adjourned.

On the 5th June, 1906, a conditional order for attachment was made against Birt for his contempt of Court in failing to obey the order of the 29th May, 1906, unless he signed the notes before the 12th of June.

On the 29th of May, Birt filed a petition for adjudication against himself. On the 1st June the petition came before the Court, when an order was made refusing the adjudication on the ground that the debtor had disobeyed the order of the 29th of May, and that the petition was a fraud on the creditors. From this order, and from the order of the 5th June, 1906, Birt appealed.

Counsel on behalf of the surety appeared before the Court of Bankruptcy, on the 1st June, and asked that the motion against him should be dismissed on the ground that the various adjournments had been obtained without notice to him, and also on the ground that under no circumstances should he be compelled to sign the notes until the debtor had done so, and, therefore, the Court could make no order against him. This application was adjourned pending the appeal.

Appeal. 1906. *In re* BIRT.

Blood, K.C., for the appellant:—

Once the debtor failed to pay the 2*s.* 6*d.* in cash, the arrangement was at an end, and the creditors were remitted to their original rights. The payment of 2*s.* 6*d.* in cash was the foundation of the entire transaction; there was no such term in the proposal in either of the cases of *In re H.* (1), and so these cases do not apply. The Court cannot order the surety to sign the notes before the debtor: *Re M. & R.* (2). The only way to enforce obedience to the order was to dismiss the petition, as an order of the Court had not been complied with: *Re A. B.* (3). If a trader petitions for adjudication against himself, and his assets are insufficient to pay his creditors, the adjudication will be granted if the proceedings are *bona fide*: *Re Marks* (4).

Ronan, K.C., and *W. Herbert Boyd*, for opposing creditors:—

We submit that the orders are right. To decide otherwise would amount to this, that where a man is under a legal obligation to do four things, he can get rid of the entire obligation by not doing the first. It would also mean that the surety can obtain his release from his obligation by the arranging debtor refusing to pay the 2*s.* 6*d.* in cash. Once the proposal was accepted and confirmed by the Court, it became binding on everyone by sect. 347. The debtor has had the benefit of the acceptance of the proposal, because he has been protected from process, and in consideration of that the creditors should get the benefit of Quigley's contract and the debtor's contract.

The Court can order the debtor to sign the notes, and can attach him if he refuses to do so: *Re H.* (1). The decision in *Re M. & R.* (2) is distinguishable from this, because there was no undertaking in that case by the surety to sign. Here the obligation of the surety was complete on the 13th March, when he undertook to sign the notes, and the surety has not appealed against that order. The surety is not a party to the payment of the 2*s.* 6*d.* The surety cannot be compelled to sign the notes until the debtor signs, and the only mode in which the contract can be enforced is by attachment.

(1) I. R. 11 Eq. 106, 334.
(2) 30 I. L. T. R. 137.
(3) 3 I. L. T. 695.
(4) I. R. 1 Eq. 67.

SIR SAMUEL WALKER, C. :—

We do not require to hear counsel in reply. There are two questions in this case—(1) whether an order made that Birt should be committed to gaol in Londonderry for refusing to obey the order of the 29th May directing him to sign the composition notes should be reversed; and (2) whether an order refusing to adjudicate Birt a bankrupt on his own petition can be sustained.

Birt presented a petition for an arrangement to the Court of Bankruptcy in February of the present year, and on the 27th March his proposal was accepted, and confirmed by the Court; and the construction of the terms of this proposal is the important matter before us. The proposal was that he should pay 10*s.* in the £1, by four instalments of 2*s.* 6*d.* each, the first of said instalments to be paid in cash within one month from the acceptance of the proposal, and the balance in three equal instalments of 2*s.* 6*d.* to be paid at five, nine, and twelve months, respectively, from the date of the acceptance of the proposal; and these last three instalments were to be secured by the joint and several promissory notes of the debtor and one Quigley. In my opinion, it is incorrect to contend that these were independent stipulations: the most important was that the 2*s.* 6*d.* in cash should be paid within one month from the acceptance of the proposal, and the composition notes hang and follow on that. If the 2*s.* 6*d.* in cash was to be paid forthwith, or before three o'clock that day, or before the rising of the Court, and the debtor failed to pay, could it be contended that the arrangement had not broken down? In this case the arranging debtor failed to pay the first instalment: why then should he be compelled to sign the composition notes, or Quigley be compelled to sign these notes, when the carrying out of the arrangement was impossible? On the 29th May, Birt had not paid the 2*s.* 6*d.*; he had obviously intended to pay it by getting in some outstanding debts; but he failed to do so. Then he was asked to sign the promissory notes, and he refused; and, in my opinion, a Court of Equity would not compel him to sign. We have the authority of this Court in *Re M. & R.* (1) that the

(1) 30 I. L. T. R. 137.

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surety cannot be compelled to sign composition notes in an arrangement before the debtor signed.

But what was the object of making the order of attachment? It was by putting Birt in gaol to make Quigley sign the notes; in other words, putting him in gaol for a collateral purpose. That ought not to be done, and it would be of no use if Birt still refused to sign. The order, therefore, attaching this man cannot under the circumstances be sustained, and should be discharged.

If that fails, then Mr. Boyd for the respondent admits that it would be right to adjudicate this man bankrupt. Under sect. 353 of the Bankruptcy Act, if an arranging debtor fails to comply with any order of the Court, his petition may be dismissed. If we are right in holding that he should not be sent to gaol, the right thing for the creditors is to turn the case into bankruptcy and realize the assets.

There is no ground for disbelieving the statement of the debtor, that he was unable to get in the outstanding debts due to him, or for saying that he suppressed anything, or that all the assets are not there. I am, therefore, of opinion that the appeal should be allowed.

Fitz Gibbon, L.J. :—

The fallacy which seems to me to underlie the contention of the respondents is that it divides the proposal of the debtor, and treats it as a proposal to do two things, though, in fact, it was a proposal to do one. Some confusion also arises from the fact that we have to deal not only with the debtor, but also indirectly with a surety.

The debtor's proposal was indivisible; it was to pay 10*s.* in the £1, 2*s.* 6*d.* in cash within one month from the confirmation of the offer by the Court, and the balance by three subsequent instalments of 2*s.* 6*d.* each. For a cause for which he was not culpably responsible, the debtor, before any notes had been signed, failed to pay the first 2*s.* 6*d.* in cash. It is admitted that, both by reason of the provisions of the Debtors Act, and also because he was not culpable, an order of committal could not be made against the debtor for failing to pay the 2*s.* 6*d.* In my opinion, it follows that no order could be made to commit him for

not signing the notes, after default had been made in the payment of the 2*s.* 6*d.* Some of the creditors now come forward and say—We would prefer to have 7*s.* 6*d.* secured by composition notes to be signed by Quigley, and we will take these notes in satisfaction of the proposal. But the proposal was not to give them 7*s.* 6*d.* in notes signed by Quigley. The proposal fell through by the non-payment of the 2*s.* 6*d.*; every creditor was thereby remitted to his original rights; no creditor could now be compelled to take the composition notes for 7*s.* 6*d.*, nor could the giving of these notes now set up the proposal. The Court can not now make the surety sign them, nor would the debtor's signing them benefit the creditors in any way.

How does the introduction of Quigley alter the rights and liabilities of the debtor and creditors? The Court cannot make an attachment order against one man—the principal debtor—for the purpose of getting at another, who was intended only to be a surety. It would be assuming jurisdiction for an indirect cause. What right is there to assume that it would be done? If the principal was sent to gaol, Quigley could not be compelled to sign, unless or until Birt purged his contempt by signing the notes. The Lord Chancellor has put the case of a proposal to pay 2*s.* 6*d.* cash down, and 7*s.* 6*d.* to be paid by deferred instalments, secured by the joint and several promissory notes of the arranging debtor and a surety; in that case the surety could not be compelled to sign the notes until the debtor had first paid the 2*s.* 6*d.* and given notes. We have our own authority for that: *Re M. & R.* (1).

It is conceded that the two orders of Boyd, J., are inconsistent. He could have adjudicated the debtor a bankrupt on his own petition, but the proceeding to enforce the original proposal cannot be of any use to anyone, as the first step—the payment of the 2*s.* 6*d.*—has become impossible. Quigley never undertook to guarantee 7*s.* 6*d.*, except for a debtor who was to pay 2*s.* 6*d.* to begin with. The debtor now says:—"I proposed to pay 2*s.* 6*d.* in cash, and to give secured notes for 7*s.* 6*d.* more; I have failed to pay the 2*s.* 6*d.*; I cannot do it, through no culpable default of my own—make me a bankrupt." In my opinion, effect should

(1) 30 I. L. T. R. 137.

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be given to his petition for adjudication; and accordingly our order will be—Discharge both orders of the Court below, make the order of adjudication against Birt on his own petition, and no rule on the motion to commit him for contempt.

Holmes, L.J., concurred.

Solicitors for the appellant: *Bennett, Thompson, & M'Laughlin.*
Solicitors for William Mitchell and other creditors: *Knox, Gilliland, & Babington.*

R. D. M.

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June 7, 26.

COUNTY COUNCIL OF KERRY *v.* O'CONNOR (1).

Harbour constable—Maximum salary—Collector of tolls and rates—Additional remuneration—16 & 17 Vict. c. 136, ss. 7, 9.

Where a harbour constable, appointed at the maximum salary under 16 & 17 Vict. c. 136, is also appointed collector of harbour tolls and rates, the duties of the two offices are distinct, and it is lawful for the County Council, by resolution, to authorise the harbour constable to retain a commission on tolls and rates as remuneration for his services as such collector.

Case Stated by Johnson, J., at the Tralee Spring Assizes, 1906. A civil bill was brought at the Listowel Quarter Sessions, January, 1906, by the plaintiffs against the defendant for £2 1*s.* 7*d.*, money had and received by the defendant for the plaintiffs' use and account in respect of tolls collected by him as harbour-master and harbour constable at Tarbert, in the county of Kerry. Prior to the year 1897, the pier or quay of Tarbert Island, pursuant to the provisions of the 16 & 17 Vict. c. 136, s. 7, duly became the public property of the county of Kerry, and was duly transferred to the Grand Jury, and held, maintained, and preserved by the Grand Jury of the county, and the defendant, Timothy M. O'Connor, was duly appointed by the Grand Jury under the provisions of the 16 & 17 Vict. c. 136, s. 9, "The Harbour Constable" of the pier or quay of Tarbert

(1) Before Palles, C.B., and Gibson, J.

Island, at a salary of £15 payable to him by Grand Jury presentment.

The Grand Jury of the county of Kerry, by resolution dated 10th March, 1897, appointed the defendant collector for the purpose of receiving all tolls and rates to be levied at the pier or quay of Tarbert Island; and further resolved that, in addition to the salary payable to him as harbour constable, the defendant should be entitled to receive a commission on the amount of rates and tolls to be received by him, and also that his salary should be raised from £15 to £20 per annum.

After the passing of the Local Government Act, 1898, the defendant continued in office as an existing officer receiving the salary of £20 per annum and retaining 5 per cent. of the tolls collected.

Upon 17th June, 1903, the County Council of Kerry by resolution appointed a number of persons named in the schedule thereto as harbour constables for the purpose of collecting all tolls and rates payable for the use and occupation of the harbours, piers, quays, and landing-places set forth, and also for enforcing the by-laws, orders, and regulations therein referred to, and for the purpose of settling all disputes respecting the occupation or use, and the due and proper preservation, of the harbours, piers, quays, and landing-places named, at the salaries set opposite their names, together with 5 per cent. on the tolls collected by them. In this schedule the defendant was entered as follows:—

Name of Person.	Harbours, Piers, Quays, and Landing-Places.	Salaries.
T. M. O'Connor, .	Tarbert, ...	£20

The defendant continued to receive the salary of £20 per annum, and also to receive and retain 5 per cent. upon the tolls and rates collected by him until the 1st January, 1905. The sum sued for represented 5 per cent. upon tolls collected and retained by the defendant in the year 1905. The County Court Judge dismissed the civil bill upon the grounds that the duties

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of harbour constable and the duties of toll-collector were different and distinct duties, and implied two separate offices for which separate remuneration was payable.

The plaintiffs appealed from the dismiss to the Judge of Assize at the Spring Assizes for the county of Kerry, 1906. For the plaintiffs it was contended that by virtue of the Grand Jury Act, 1853 (16 & 17 Vict. c. 136), ss. 7 and 9, adapted by the Adaptation of Irish Enactments Order in the schedule to the Privy Council Order, 30th January, 1899, the maximum salary of a harbour constable was fixed at £20 per annum; that it was the duty of the harbour constable to collect the tolls and rates payable in respect of the pier and quay of Tarbert Island, and that the aforesaid resolutions of the Grand Jury, 1897, and County Council, 1903, in so far as they authorised the defendant, Timothy M. O'Connor, to retain a commission of £5 per cent. on the tolls collected by him, in addition to his salary of £20 per annum, were respectively *ultra vires* and invalid, and that the moneys so retained by him were received to the use of the plaintiffs. For the defendant it was contended that the duties of the harbour constable were to enforce the by-laws, rules, and regulations of the pier and quay of Tarbert Island, and to settle disputes about the manner and use of the pier and quay, and its proper care and preservation, and for these purposes his salary £20 yearly was payable; that the collection of and accounting for tolls and rates was a different office, different matter, and different duty, and though the harbour constable was employed to discharge the duty of collecting and accounting for tolls, as well as to discharge his duty to enforce by-laws, and to settle disputes about the use of the pier, and enforce its due preservation, still the two offices and classes of duty were distinct and different; and therefore the County Council had power to appoint the defendant to collect and account for the tolls as distinct from his office of harbour constable; and that this necessarily involved the power reasonably to remunerate him for the work of collecting and accounting for the tolls by allowing him to retain a percentage of the tolls; and therefore that the County Court Judge was right.

The learned Judge of Assize was of opinion that the plaintiffs

were entitled to a decree; but upon the application of defendant's counsel, directed this case to be stated.

The question for the determination of the Court was, whether the plaintiffs were entitled to recover all, or any, and what part of the money sued for.

Muldoon, for the appellant, T. M. O'Connor.

A. M. Sullivan, for the respondents, the County Council of Kerry.

The judgment of the Court was delivered by—

June 26.

PALLES, C.B.:—

The question in this case is whether, under the statute 16 & 17 Vict. c. 136, the Grand Jury were entitled to appoint a collector of harbour tolls and rates, with special remuneration. The plaintiffs contend that, by the conjoint operation of sects. 7 and 9 of the statute, the harbour constable, when appointed, became collector; and that the statutory pay of that officer being prescribed, no addition in excess of the sum so fixed can be allowed. The County Court Judge held that the offices were distinct, and dismissed the claim. The Judge of Assize was of a contrary opinion.

Under 6 & 7 Wm. 4, c. 108, sects. 13 and 14, the office of collector was a substantive office, the salary or pay of which was not limited by the enactment. The Act does not create any office of harbour constable. Section 14 authorised the Commissioners of Public Works to make by-laws, *inter alia*, for the payment of rates. The 9 & 10 Vict. c. 3, s. 70, also gave a general power of making by-laws.

Under 16 & 17 Vict. c. 136, s. 7, Tarbert Harbour became the public property of the county; tolls and rates for the use of the harbour were to be fixed by the Commissioners of Public Works, as before, with the approbation of the Treasury. The previous powers of making by-laws were preserved intact; but all tolls and rates were to belong to the county, and were to be levied, collected, and applied, under the direction of the Grand Jury; and *payment* thereof was to be *enforced by such person as they*

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should appoint to receive the same, in like manner as payment of tolls and rates under the previous Acts was enforced by the Commissioners of Public Works, or their lessees or officers. These powers included a power of seizure.

If this section stood alone, it would seem clear that the Grand Jury were authorized to appoint a collector, and fix his remuneration. However, section 9 (which does not refer to sect. 7) enables the Grand Jury, from time to time as occasion shall require, to appoint a proper person, at a salary not exceeding £20 per annum, for enforcing the by-laws, rules, orders, and regulations (if any), made by the Commissioners respecting such work, and for settling all disputes. This officer, called "harbour constable," has police powers; and his salary may be presented without any application to Presentment Sessions.

Section 10 directs the appropriation of penalties. It was not referred to in argument; but it is important, as it contemplates that penalties for breach of by-laws may be sued for by a common informer.

Under the above legislation, we are of opinion that the duty of collection is not imposed upon the harbour constable; that a collector may be appointed as a distinct officer; and a harbour constable, employed to collect tolls, may be paid for the performance of that duty.

When the Act 16 & 17 Vict. c. 136 was passed, the collectorship was a recognized and substantive office. Section 7 appears to contemplate the appointment of a person with like duties. The receipts collected might amount to a substantial sum if the harbour was large; and in such case the collector should be a responsible person, who might be required to give security for the due performance of his duties, and who might reasonably expect proportionate pay.

Section 9 purports to create a new office, with defined duties; it does not expressly, or by implication, make the harbour constable collector; the duties imposed upon him do not cover collection. His function is to enforce by-laws respecting the harbour, and settle disputes. He is a police officer, with administrative duties, such as devolve upon a harbour-master; and penalties may be enforced by a common informer.

Were the intention of Parliament that insisted on by the plaintiffs, the general expression in sect. 7, "such person as they may appoint to receive the same," should have been replaced by the particular one, "the harbour constable"; or, if that alteration was not made, at least sect. 9, when enumerating the various duties of that officer, should have specified as one of them the "collecting and enforcing payment of tolls." Taking the words of the two sections as they actually stand, the right of the harbour constable to collect tolls by virtue of his office depends, not on express enactment, but on implication; and this, although the legality of a seizure for non-payment of tolls would depend upon this right, which, for this reason, if intended to be given, should have been conferred in clear and unmistakable terms.

This implication is said to arise from a duty to enforce the by-laws, the purposes of which, under 6 & 7 Wm. 4, c. 108, s. 14, include the payment of tolls. It is only in that way the implication could be brought in. But as to this, two observations should be made. (1) That sect. 7 of the Act of 1853 differs from that of 1836 by requiring the consent of the Treasury to the fixing of the rates of tolls; and as such consent is not required to by-laws in general, the most important element as to tolls, *i.e.* their amount, is thereby taken out of the subject-matter of by-laws. The remaining matter as to tolls capable of being dealt with by by-law is the person to whom they should be paid; and the construction which would give the prescribing of this person, not to the body who is to appoint the collector, but to another body, whose jurisdiction seems to be confined mainly to the structure, seems strange.

(2) Leading in the same direction is the observation that these statutes of 1836 and 1853 differ in their descriptions of the subject-matter of the power to make by-laws. The first Act contains, whilst the second omits, in that description the words "for the payment of the tolls."

All this, taken in connexion with the limitation which section 9 of 16 & 17 Vict. c. 136 contains in the description of the by-laws, that they are to be made "respecting any such works," leads to the conclusion that the by-laws referred to in section 9 are those only which are made in reference to the structure of the pier, &c.

The main argument for inferring an obligation in the harbour

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constable to act as collector is that, according to the general policy of the Grand Jury Code, remuneration should be on a prescribed scale. This argument is not without weight; but it appears insufficient to control or alter the *prima facie* operation of section 7, which stands apart from, and is independent of, section 9. The settlement of disputes does not refer to the payment or enforcing of tolls, but to the constable's functions as *quasi* harbour-master. The enforcement of administrative by-laws, for breach of which a common informer can sue, and which relate to the management and use of the physical harbour, does not extend to a right to receive and sue for tolls.

We are therefore of opinion that the duties of collector and harbour constable being distinct, the defendant, though harbour constable, could be lawfully employed to discharge the duties of the former office, and that he is entitled to separate remuneration in that capacity. There is no suggestion that the scale fixed is unreasonable or unfair. The express exemption from the jurisdiction of the Presentment Sessions, conferred by section 9, in respect of the harbour constable's salary, does not apply to collector's remuneration under section 7; but no question now arises as to this. On the points argued, we decide that the plaintiffs' action fails; and that the dismiss must be affirmed, with costs.

Solicitors for the plaintiffs: *F. & C. Downing.*
Solicitors for the defendant: *Creagh & Byrne.*

J. L.

DENNY *v.* WRIGHT (1).

(1905. No. 8569.)

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May 1, 2, 3.
June 13.

Ecclesiastical lease—Immediate and sub-perpetuity grant—Covenant—Reddendum—Purchase of fee-simple—Right of sub-grantee to vary rent—Tithe Rentcharge (Ireland) Act, 1900, *ss.* 2, 3—*Irish Land Act*, 1903, *s.* 90.

In 1852 the plaintiff, an ecclesiastical lessee with customary right of renewal, who had obtained a grant in perpetuity under the Church Temporalities Acts, made a sub-grant in perpetuity, under the same Acts, to the defendant in respect of a sub-lease with *toties quoties* clause of renewal. The reddendum in this sub-grant was of the original rent, "or such increased or diminished yearly rent . . . as shall be substituted . . . on the terms specified in the covenant in the indentures of 3rd August, 1764, and 22nd March, 1836" (the original sub-lease and a renewal thereof), "pursuant to the proviso for that purpose in the recited Acts" (3 & 4 Wm. 4, c. 37, and 6 & 7 Wm. 4, c. 99). The covenant referred to, and which was contained in the original sub-lease and renewal, was to the effect that as often as the plaintiff should obtain a renewal he would renew the sub-lease on payment by the sub-lessee of one-third of the fines and expenses paid by the immediate tenant to the See.

The plaintiff purchased the fee under the Irish Church Act, 1869.

In an action to recover one year's unvaried rent to the 1st May, 1905—

Held, that the defendant (the sub-grantee) was entitled to a reduction under section 90 of the Irish Land Act, 1903.

NEW TRIAL MOTION.

The action was tried before Madden, J., without a jury on the 31st January, 1906. From the learned Judge's report it appeared that the action was brought to recover the sum of £78 1*s.* 4*d.*, being one year's rent, in perpetuity, from the 1st May, 1904, to the 1st May, 1905.

This rent was reserved by a sub-perpetuity grant under the provisions of the Church Temporalities Acts, and made between Anthony Denny of the one part, and Charles Hopes of the other part. Anthony Denny held under a perpetuity grant executed in respect of a superior lease demised immediately from the fee, and

(1) Before PALLES, C.B., and ANDREWS and KENNY, JJ.

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the sub-perpetuity grant of 1852 was executed in respect of an inferior lease, containing the usual *toties quoties* covenant for renewal. The estate of Anthony Denny became vested in the predecessor in title of the plaintiff, who, on the 10th August, 1873, obtained a conveyance of the fee-simple from the Church Commissioners, the sale being carried out under the provisions of the Irish Church Act. The sub-perpetuity grant of 1852 contained a reddendum, usual in the creation of interests of the kind, under which the grantor was bound to vary the rent of his grantee so often as he should obtain a variation of his rent under the Church Temporalities Acts. (The reddendum will be found in the Chief Baron's judgment, *infra*, p. 468.) The rent reserved by the first perpetuity grant was never varied, and the action was brought for the recovery of this rent by the plaintiff, in whom the fee-simple as well as the interest under the first perpetuity grant was vested.

It was contended on behalf of the defendant that the sub-grantee acquired, under the Church Temporalities Acts, an independent statutory right to have his rent revised on his own initiative, and he paid into Court the amount of the rent reduced in accordance with the statutes referred to in his defence. "It was always assumed," the learned Judge added, "that the right of the sub-grantee to revision was dependent on the action of the superior grantee; and the covenant in the deed of 1852 is framed on this assumption. It is more important to observe that the Irish Church Act, framed with such careful regard to the owners of interests of the kind, supports the same conclusion. I reserved judgment in order to consider the arguments of defendant's counsel. I was of opinion that the defendant had, on the facts of the case, no right to revision of his rent, either under the covenant or under the Church Temporalities Acts; and on the 3rd February I gave judgment for the full sum claimed, with costs."

The defendant moved to have this judgment set aside and judgment entered for him, on the ground that the rent sued for was a variable rent, within sect. 90 of the Irish Land Act, 1903, and that the amount paid into Court by the defendant was sufficient.

Ronan, K.C., Harrison, K.C., and *Meredith*, for the defendant.

W. M. Jellett, K.C., and *Dickie* (with them *The Right Hon. J. H. Campbell, K.C.*), for the plaintiff.

The arguments sufficiently appear from the judgment of the Lord Chief Baron.

Reg. (*Metge*) v. *Chairman and Justices of Meath* (1), *Bernard* v. *Hungerford* (2), *M'Sweeney* v. *Drapes* (3), and *Capital and Counties Bank* v. *Rhodes* (4), were referred to.

Cur. adv. vult.

June 13.

PALLES, C.B. :—

The question for decision upon this motion is whether a fee-farm rent, reserved by a grant of 31st August, 1852, is "a variable rent," to which the provisions of sect. 90 of the Irish Land Act, 1903, apply. That section enacts—

> "Where, by reason solely of the non-publication of the average prices of produce in the *Dublin Gazette*, it has become impossible, in the absence of other provision, to determine the amount by which any variable rent calculated on an average of prices would be varied, sections 2 and 3 of the Tithe Rentcharge (Ireland) Act, 1900, shall apply, . . . and the words 'tithe rentcharge' in the said sections shall be deemed to include any variable rent as aforesaid."

If this rent be within this section, its amount had admittedly been automatically reduced before the gales in question here accrued due, and the amount paid into Court is sufficient to satisfy the plaintiff's claim, calculated on such reduced amount. Therefore, in that event the verdict and judgment must be entered for the defendant. If the rent be not within the section, then the judgment for the plaintiff must stand.

To be within this section, the rent must answer two descriptions—(*a*) It must be a variable rent, calculated upon an average of prices of produce; (*b*) It must be such that, by reason solely of the non-publication of the average prices of produce in the *Dublin Gazette*, it has become impossible to calculate the amount of the variation.

Now, if it be a rent variable with the average price of produce, and thus be within the first description, it also answers the second, as it is admitted that, in that event, it would be impossible to calculate the amount of the variation, and that that impossibility

(1) [1898] 2 I. R. 592.
(2) [1902] 1 I. R. 89.
(3) [1905] 1 I. R. 186.
(4) [1903] 1 Ch. 631.

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arises solely from the non-publication in the *Dublin Gazette* of the average price of oats.

Thus, the sole question is, Is the rent variable according to an average of prices of produce?

The grant is of a sub-perpetuity, under the Church Temporalities Acts. The reservation of the rent is in these words:—

> "Yielding and paying therefor and thereout yearly and every year unto the said Anthony Denny, his heirs and assigns for ever, the yearly rent or sum of £78 18*s.* 4½*d.*, being the amount of the original rent and annual fees so as aforesaid reserved in and by the before-recited indentures of the 3rd August, 1764, and of the 22nd March, 1836, and the amount of the said Charles Hopes' proportion of the increased rent so as aforesaid payable by the said Anthony Denny, for or on account of the purchase of the fee and inheritance as aforesaid, *or such increased or diminished yearly rent* or sum as shall or may from time to time, or at any time hereafter, be *substituted* in the place or stead of the said reserved rent *on the terms specified in the said covenant* contained in the hereinbefore in part recited indentures of the 3rd day of August, 1764, and the 22nd day of March, 1836, *pursuant to the proviso for that purpose contained in the said recited Acts.*"

Thus the terms of the reservation show that the rent is variable, and the question comes to this—According to what is the variation to be calculated? Two elements, and two only, are pointed at in the reservation; and it must be either from a combination of these, or from one or the other of them exclusively, that the variation must be ascertained. I need not say that, according to all rules of construction, the preferable interpretation will be one which will make each of these two elements material in the variation, for otherwise we would refuse any effect to the introduction into the reservation of the element which is held to be immaterial.

The two elements are—

> (1) "The terms specified in the said covenant" contained in the deeds of 3rd August, 1764, and 22nd March, 1836;
>
> (2) "The proviso for that purpose," *i.e.* for the purpose of variation of rent, "contained in the said recited Acts."

The covenant referred to as being in the deeds of 1764 and 1836 (which are recited in the grant to be respectively an original sub-lease and a renewal of it) is one for a *toties quoties* renewal;

and is in the ordinary form, viz.: that *as often as* the lessor should obtain from the See of Clogher any renewal of the term or interest in the lands, he would renew the lease to the lessee, by adding thereto such further term as he should obtain from the Lord Bishop of Clogher, and upon the terms of the payment by the sub-lessee to his lessor (the immediate tenant to the See), of "one full third of the fines and expenses" which the immediate tenant should pay for the renewal of his head-lease.

This covenant is relied upon by the plaintiff for two purposes. He says, first, that by it the *amount* of the variation of the rent is made to depend, not upon the price of corn, but on the amount of each renewal fine which the mesne tenant should pay to the bishop; and, secondly, that by the covenant the *right* to the variation is made dependent on the mesne tenant, Denny, obtaining a renewal, and that as Denny's representatives have not obtained, and could not, in the events which have happened, have obtained a renewal, and have not applied for or obtained a variation of their rent, the event has not happened upon which, according to the covenant, the defendant's *right* to a variation accrues.

Now, long before the execution of the grant of 1852, the subject-matter of this covenant had ceased to exist. Denny had obtained his perpetuity. No longer could he be called on to pay fines; no longer could there be any expenses incident to his obtaining a renewal lease. Therefore, the reservation in this grant, unless altered by contract, of which there is no suggestion, or affected by statute, could not have imposed any liability, or conferred any benefit, upon the grantee.

There are, however, provisions in statutes which control the covenant, and when controlled by them the covenant can have effective operation, and is capable of conferring benefits and liabilities on the parties respectively. This consideration brings in the second element mentioned in the reservation.

Under section 149 of 3 & 4 Wm. 4, c. 37, by reason of the covenant in the leases of 1764 and 1836 being for *toties quoties* renewal, the conveyance of the perpetuity to the mesne tenant operated as a renewal to the sub-lessee of those sub-leases, at a fine which should be equal in amount to one-third of the average

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renewal fine payable previously to the purchase, as ascertained by the certificate of the Commissioners; and by 6 & 7 Wm. 4, c. 99, sect. 1 and sect. 5, he became entitled, by reason of the same covenant, to a perpetuity, at a rent which should be subject to variation in like manner and at such times as the rent reserved by the grant from the Ecclesiastical Commissioners to their immediate grantee—a variation which, by section 142 of 3 & 4 Wm. 4, c. 37, would be according to the average price of corn for a previous period of seven years.

This right was availed of by the tenant, by obtaining the perpetuity grant of 1852, and, therefore, the effect of the covenant in the leases of 1764 and 1836, as controlled and affected by the Acts, was, and is, that the rent became variable according to the price of corn.

This result has been arrived at by taking into consideration and giving effect to both the elements mentioned in the reservation; and I must say that I cannot entertain any doubt that this is the true effect of the reservation. For this reason, I am against the plaintiff upon the first argument which has been addressed to us.

As to the second argument, viz.: that as the plaintiff had not himself procured a variation, the event had not happened upon which the defendant was entitled to a variation; the event upon which, under the covenant, the rent was to be varied, was the grant of a renewal by the bishop to his immediate tenant; but the covenant was, in reference to the time of variation, controlled and qualified by the statutes, just as much as I have shown was the nature of the variation; and, ultimately, by sect. 5 of 6 & 7 Wm. 4, c. 99, the time of variation is made identical with the time at which the immediate grantee of the See is entitled to apply for a variation of his rent, *i.e.* the time fixed by sect. 142 of the earlier Act—a time which admittedly has arrived, and at which the defendant admittedly applied for the variation.

As I read sect. 5 of the Act of 6 & 7 Wm. 4, the right to variation thereby conferred upon the sub-grantee is a right wholly independent of any application for variation by the immediate grantee, and accrues at the time at which that immediate grantee *might have* applied for a variation, if he so thought fit.

The only remaining argument material to be referred to is that, even supposing the owners of the sub-lease to have been entitled prior to the passing of the Irish Church Act, 1869, to the variation insisted upon, that right was lost, by reason either of that Act, *per se*, or of it taken in connexion with the subsequent purchase by the plaintiff of the head-rent theretofore payable to the Church Commissioners.

I must confess that I have been absolutely unable to follow, much less to concur in, either of these arguments. By section 34 of the Act of 1869, the Commissioners were placed under an obligation to offer to sell at a certain price, to the plaintiff here or his predecessor, the head-rent payable to them, and until they made that offer they were prohibited from selling to the outside public. This section gave the plaintiff a certain right. It placed him under no obligation. He elected to avail himself of his right of pre-emption, and a conveyance of the head-rent was taken by the trustees. It does not very clearly appear from the documents we have been referred to whether there was a merger of it at law in the fee. But this is wholly immaterial. Neither by the Act, nor by this purchase, were the rights of the defendants affected. The variable rent payable to the Church Commissioners by the plaintiff may have ceased to exist; but that payable to the plaintiff continued. The rights of the plaintiff in relation to that rent remained as before the Act. It was then a variable rent. It is impossible to contend that by reason of the Act it became a fixed rent. There is no provision in the Act to that effect.

Bernard v. *Hungerford* (1) and *M'Sweeney* v. *Drapes* (2) were referred to. In my opinion, neither of them applies here. In each of them the plaintiff was a sub-tenant under a lease with a *toties quoties* covenant for renewal; but his lessor, the mesne tenant, had no *right* of renewal. After the Act, the mesne tenants could not obtain renewals of their leases, and consequently the events in which the sub-tenants were by contract entitled to the renewals of their sub-leases never happened. The mesne tenant in each case purchased the fee, and the object of the suit was to impose upon the fee-simple so purchased, or upon the purchasers because

(1) [1902] 1 I. R. 89. (2) [1905] 1 I. R. 186.

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they purchased, an equity which, under the lease, could have existed only in the event of the newly acquired interest having been so acquired by renewal lease instead of by purchase of the fee. I prefer not to enter upon the questions discussed in those cases, as they do not arise here. One of the material factors in each decision was that the plaintiffs were not, in the events which happened, within the terms of the *toties quoties* covenants. Here, the defendant is, as we hold, entitled, under the prior statutes, to a variation of his rent. That right is absolutely independent either of the Church Act of 1869 or of the purchase of the fee. He does not, as did the plaintiffs in those suits, claim any benefit through the purchase.

The verdict and judgment for the plaintiff must be set aside, and entered for the defendant.

ANDREWS, J. :—

I concur in the judgment of my Lord Chief Baron, and have nothing to add.

PALLES, C.B. :—

I should state that Mr. Justice Kenny, who heard the case with Mr. Justice Andrews and myself, has read my judgment and concurs in it.

Solicitors for the plaintiff : *Redington & Sainsbury.*
Solicitor for the defendant : *W. Martin.*

J. I

HUGHES, APPELLANT; THE EARL OF PEMBROKE AND HIS AGENT, FANE VERNON, RESPONDENTS (1).

K. B. Div. 1906. April 26, 27. May 17.

Pembroke township rate—Profits received out of land—Sandpits—Valuation Acts—Certificate of valuation—Column in which lands other than agricultural should appear—Pembroke Township Act, 1863 (26 & 27 *Vict. c. lxxii*), *s.* 46—15 & 16 *Vict. c.* 63, *ss.* 11, 12.

By the Pembroke Township Act, 1863, the Pembroke Urban District Council is enabled to make a township rate upon the occupiers of lands, buildings, &c., within the township, according to the yearly value of the same. P. was the owner and occupier of sandpits within the township, and was rated on these, for the purpose of the township rate, in respect of the profits derived out of them:—

Held, that the word "lands" in sect. 46 of the Pembroke Township Act is not used in the restricted sense applicable to the word in the Valuation Act, 1852, viz., as meaning agricultural land only, but includes property such as the sandpits in question, and that P. was properly rated in respect of the profits received out of the same.

In the certificate of valuation given under the Valuation Acts such property should be placed, not in the column headed "Lands," but in the column headed "Railways, Fisheries, Tolls, Half-rents, &c."

THE facts sufficiently appear from the judgment.

Matheson, K.C., O'Connor, K.C., and *W. G. Jefferson*, for the appellant.

Ronan, K.C., and *The Hon. Cecil Atkinson*, for the respondents.

The following statutes and cases were referred to:—

43 Eliz. c. 2; 1 & 2 Vict. c. 56, sect. 63; 15 & 16 Vict. c. 63, sects. 11 and 12; 17 & 18 Vict. c. 103, sects. 1, 60, 62; 26 & 27 Vict. c. lxxii, sects. 3 and 46; *Reg.* v. *Aylesford Union* (2); *Redington* v. *Millar* (3); *Colebrooke* v. *Tickell* (4);

(1) Before LORD O'BRIEN, L.C.J., and KENNY, J.

(2) 26 L. T. (N. S.) 618.

(3) 24 L. R. Ir. 65.

(4) 4 A. & E. 916.

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May 17.

Alma v. *Corporation of Dublin* (1); *The King* v. *Churchwardens of Alderbury* (2); *The King* v. *The Inhabitants of Woodland* (3); *The King* v. *Brown* (4); *The King* v. *Chaplin* (5).

The judgment of the Court was delivered by—

KENNY, J.:—

The complainant in this case is the collector of rates for the Pembroke Urban District Council, authorized by the 63rd section of the Towns Improvement Act (Ireland), 1854, to take proceedings for the recovery of what is now the urban district rate. The defendant, the Earl of Pembroke, is the owner and occupier of certain sandpits at Merrion-road, in the county Dublin, containing 2A. 3R. 14P.

The defendant is sued for a second moiety of a composite rate, struck in 1905, amounting to £48 15*s*. Of that moiety £15 8*s*. 4*d*. represents the poor rate, and the balance, £33 6*s*. 8*d*., represents the urban district rate. There is no controversy as to the defendant's liability for the poor rate, and before the service of the present summons he offered to pay the amount. The matter of the complaint was heard before Mr. Swifte, one of the Divisional Magistrates of Dublin, whose carefully considered judgments are invariably received with great respect in this Court. He dismissed the summons, save as to the portion of the rate which had been already tendered, and thereupon stated the present case for the opinion of the Court.

The question for our decision arises upon the construction of the 46th section of the Pembroke Township Act, 1863 (26 & 27 Vict. c. lxxii), which enabled the then Commissioners of the Township—now represented by the Urban District Council—to make assessments under the name of the "Pembroke Township Rate" for the purposes of the Act. The rate is to be made upon "all the occupiers, or, in case the same shall be unoccupied, upon the owners of all *lands*, dwelling-houses, shops, warehouses, vaults

(1) I. R. 10 C. L. 476.
(2) 1 East, 534.
(3) 2 East, 164.
(4) 8 East, 528.
(5) 1 B. & Ad. 926.

cellars, stables, breweries, manufactories, mills, and other houses and buildings and yards, and places within, or partly within, the township . . . according to the yearly value of the same, respectively."

On the construction of this section, Mr. Swifte came to the conclusion that, "as the rate-book stood, the defendant, while he might presumably have been rated thereon in respect of these sandpits as 'land,' is not, in fact, so rated, but only in respect of the profits of the sandpits as an incorporeal hereditament—and that upon the authorities his lordship was not liable to urban district rates in respect of such an hereditament." He adds that he arrived at this conclusion from the rate-book and the certified copy of the Poor Law Valuation.

It will be observed that Mr. Swifte is of opinion—(1) That the defendant could not be rated for the purpose of urban district rates on an incorporeal hereditament, though he could for the poor rate; (2) that the defendant is rated in respect of profits of the sandpits as an incorporeal hereditament; and (3)—though this is a matter of inference—that if the sandpits were to be rated at all for the urban district rate, they should be rated as "land."

The arguments before us, on behalf of the defendant, have been presented very much upon the lines of this judgment, and it will, therefore, be necessary to consider some of the sections of the Valuation Act of 1852 and the Towns Improvement Act of 1854, and to contrast the wording of the 12th section of the former with the 46th section of the local Act, to which I have already referred, in order to determine whether the word "lands," which is used in both sections, has an identical meaning, or whether as it appears in the local Act it has a more extended signification.

The 12th section of the Valuation Act, 1852, declares that for the purposes of the Act, that is, for the purposes of valuation, "the following hereditaments shall be deemed to be the rateable hereditaments, viz. all lands, buildings, and opened mines; all commons, and rights of common, and all other profits to be had or received, or taken out of any land, . . . and all rights of fishery; all canals, navigations, and rights of navigation; all railways and tram roads; all rights of way and other rights or

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easements over land, and the tolls levied in respect of such rights and easements, and all other tolls."

It is plain that the word "lands" in this section is intended to come into a different category from the other rateable hereditaments described in it, and does not extend to hereditaments rateable otherwise than as land. This result is pointed out in the judgment of the Court in *Alma* v. *The Corporation of Dublin* (1); and it is emphasized by the language of the 11th section, which provides that every "valuation in regard to the land shall be made upon an estimate of the net annual value thereof with reference to the average prices of the several articles of agricultural produce" specified in the section. Not only is that so, but it seems to me to necessarily follow that in any valuation by the Commissioner of Valuation of a hereditament under the title of "land," the latter must be regarded as agricultural land, and a valuation must be placed upon it commensurate only with its value as such.

In the present case the certificate of valuation, under the heading of "Occupiers" and "Immediate Lessors," places the name of the defendant; and in the next column under the heading "Description of Tenement" it puts "Sandpits"—with the area of 2A. 3R. 14P. The certificate then proceeds to give the rateable annual valuation, which is made up of four columns, with the following headings:—(1) Lands, (2) Buildings, (3) Railways, Fisheries, Tolls, Half-rents, &c.; and (4), Total. There is no figure under the titles "Lands" or "Buildings," but under heading (3), and in the Total, is given the figure of £200. It does not appear anywhere how that sum is arrived at, but it is reasonably clear that it must represent something far above and beyond the valuation as agricultural land of the 2A. 3R. 14P.

The township rate-book substantially follows the valuation certificate, with this exception, that the second heading in it is given as "value of building and rateable property"; that it differentiates between the property subject to assessment for poor rate and that subject to assessment for the urban district rate; and that the £200 appears only under the heading "Total."

So far as the Valuation Act is concerned, it does no more than

(1) I. R. 10 C. L. at p. 482.

point out what the Legislature regarded as rateable hereditaments for the purposes of a rating statute. In the case of poor rate the rating is authorized by the Irish Poor Law Acts. For the purposes of the urban district rate we must look to the 46th section of the Local Act alone. If the word "lands" in that section is to have the same meaning as "lands" in the 12th section of the Valuation Act, it must mean, in my opinion, "agricultural land," and no other. If that were so, it would be impossible to impose an urban district rate upon either railways, tramways, or land which was not agricultural land, situate within the township, inasmuch as the power to impose a rate would extend only to agricultural land and the other classes of property set forth in section 46—none of which could come under the term "lands," or comprise such hereditaments as railways or tramways. In the case of the Pembroke Township this would have the effect of depriving it of a large source of revenue, and I cannot think that it was ever intended to use the word "lands" in the restricted sense applicable to it in the Valuation Act. In favour of the wider meaning, I may refer to the first section of the Towns Improvement Act, which is incorporated with the Local Act, and which gives a definition of the word "lands," which includes all the assessable property mentioned in the 46th section of the Local Act, with the addition of the word "springs." I read that definition in connexion with the 62nd section of the same Act, where it is provided that "all lands used as meadow, arable, or pasture ground only, or as woodlands, or market gardens, or nursery grounds, and all lands covered with water and used as a canal, and any towing-path to the same, and all lands used as a railway . . . shall be assessed."

It follows from this latter section that the several species of property described in it are regarded as coming under the term "lands" in the 1st section. If so, it is obvious that they must come under the description of "lands" in the Local Act, and, therefore, if it became necessary to assess any of the property mentioned in the 46th section, other than what might be termed agricultural land, it should be found in the certificate of valuation, not under the heading "lands," but in the column headed "Railways, Fisheries, Tolls, Half-rents, &c."

Furthermore, if all these species of property are "lands," why

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should not sandpits be also regarded as such? Therefore, in the urban district rate-book, I think it would have been correct to have placed sandpits under the heading of "lands," as being the only species of property rateable under the 46th section of the Local Act capable of including them. The fact of their not being placed under that heading does not prevent us from holding that they are assessable under the Act.

In the course of the argument we asked counsel for the Local Authority to say, if sandpits were not agricultural land, under which of the numerous species of property set forth in the 12th section of the Valuation Act they would come, and they said under the head of "opened mines, or profits to be had or received or to be taken out of any lands." I do not see how they could come under the head of "opened mines," as they were not rateable unless they had been seven years open, and we have no evidence before us as to whether they are open at all. But I think that the valuation appearing in the certificate does represent "profits taken out of land," and that such profits are accordingly rateable.

For these reasons, we are of opinion that these sandpits are assessable, not as "lands" in the sense of "agricultural land," but as "land" in respect of which profits are taken, and that they were properly rated under section 46 of the Local Act, and that the Magistrate should have made an order for payment of the rate.

Solicitors for the appellant: *D. & T. Fitzgerald.*
Solicitor for the respondents: *H. F. Martley.*

J. G. T.

THE COMMISSIONER OF VALUATION, APPELLANT; THE VERY REV. PATRICK O'CONNELL, RESPONDENT (1).

K. B. Div. 1906. May 7. June 12.

Valuation Acts—Poor rate—Exemption—Hereditaments used exclusively for charitable purposes—Parochial house used as residence for parish priest—Private chapel—Room used for keeping parish registers—15 & 16 *Vict. c.* 63, *s.* 16—17 *Vict. c.* 8, *s.* 2.

A house built by parishioners for, and used by a Roman Catholic parish priest as, a residence and for parochial purposes, is not exclusively used for charitable purposes so as to be exempt from assessment for poor rate.

Nor is a room in such house, used solely as a private chapel for the occupants of the house, so exempt.

Nor a room used for keeping the parish registers and things connected with the ministration of the office of parish priest, unless exclusively so used.

CASE STATED by the Chairman of Quarter Sessions of the county of Cavan pursuant to 23 Vict. c. 4, s. 10.

The material facts as appearing from the case were as follows:

Under the Valuation (Ireland) Act, 1854, the Commissioner of Valuation in the autumn of 1904 caused a revision to be made of certain hereditaments and tenements in the county of Cavan, including the parochial house and premises in the occupation of the respondent, the Very Rev. Patrick O'Connell (hereinafter called Father O'Connell). As the result of the revised valuation, the rateable annual value of the parochial house and premises was fixed at £28 15*s.*, of which the sum of £20 was placed on the buildings.

Father O'Connell, being aggrieved by reason of this valuation, served on the Commissioner of Valuation the notice prescribed by 15 & 16 Vict. c. 63, s. 19. The Commissioner having refused to alter the valuation, Father O'Connell appealed to the Quarter Sessions, the ground of appeal being that the house and premises were exclusively used for charitable purposes, and were therefore exempt from poor rate.

(1) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and GIBSON, J.

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By consent the case was heard at Quarter Sessions by the County Court Judge, sitting alone, who, on the evidence, found the following facts:—

"In May, 1897, Father O'Connell was appointed parish priest of the parish of Drumgoon, and he took a house at a rent in the town of Cootehill, in which he resided till May, 1900, when he went to reside in the parochial house in which he now resides.

"In 1897 and 1898 meetings of the parishioners were held with a view to raise funds to build a parochial house as a residence for the parish priest for the time being, and a sum of about £500 was subscribed for this purpose.

"The parishioners (and Father O'Connell acting with them) selected a site within the parish adjoining the grounds of a Catholic convent (as appears by the map on the lease hereinafter mentioned) beside the town of Cootehill, and they then applied to the owner of this site for a lease under the 'Leasing Powers Act for Religious Worship in Ireland, 1855,' and procured it to be made to three trustees for the parishioners.

"The lease, which is dated the 19th of November, 1898, comprises 3A. 3R. 10P., statute measure, at a rent of £4 per annum, for a term of 999 years. It is made by the lessor to three trustees—the Most Rev. Edward Magennis, Bishop of the Diocese in which the parish of Drumgoon is situate; Father O'Connell; and the Rev. John M'Gauran, another priest in said diocese.

"Said lease is set out in schedule 'E,' and is to be taken as incorporated in this case.

"A further sum of £400 was then borrowed by the parishioners, in the names of the said trustees, from the Board of Works, repayable by a rentcharge on the leasehold premises of £20, payable by instalments of £10 half-yearly for 35 years.

"The two sums, amounting to about £900, were expended on the erection of the parochial house and offices, and laying out the grounds. The unskilled labour required in the building operations was done by the parishioners, who worked and drew the materials with their horses and carts, voluntarily. The buildings were completed and ready for occupation in May, 1900, when Father O'Connell went to reside in them.

"The house has six rooms, one of which is used solely as a private chapel for the occupants of the house, Mass being celebrated in it. Another room is used for keeping all the parish registers and books, and also things connected with the ministration of the office of parish priest.

"No person has a right to reside in the house except the parish priest and his servant or visitors.

"Besides being a residence, the house is used as the place in which the parishioners are to see the parish priest for all religious purposes, such as attendance to sick calls, and administering the Sacraments, when he is not in the church. Any parishioner is entitled to call on him at any hour of the day or night.

"Father O'Connell has no income except that which consists of the ordinary emoluments of a parish priest, that is to say, he receives voluntary donations on the occasions of baptisms, marriages, and burials, and the head of each family generally gives him some small donation at Easter and Christmas, known as dues.

"The instalments (hereinbefore mentioned) payable to the Board of Works for the buildings, and the said rent of £4 per annum, are paid by Father O'Connell out of the donations of the parishioners, Father O'Connell having no other source from which to pay same; all donations are purely voluntary. Subject to the obligation to pay said instalments and said rent so long as he holds the office of parish priest, and to pay a curate, the donations given to Father O'Connell are at his own disposal.

"The land included in the lease, outside the portion of it on which the buildings actually stand, is used by Father O'Connell in the following manner:—Part of it is planted with ornamental shrubs, and the remainder is used as a small vegetable garden, and for grazing a cow for his own use.

"The area of the entire premises, the valuation of which was appealed against, is six acres and two roods; but this includes a small adjoining holding of two acres two roods and thirty perches held by Father O'Connell under a yearly tenancy which began in 1899. This yearly tenancy is (with the consent of both parties) excluded from this case. This case is conversant only with the premises held under the lease of 19th November, 1898."

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The case further set out as follows:—

"I gave judgment for Father O'Connell in respect of said premises comprised in said lease of 19th November, 1898, upon the ground that same are exclusively used for charitable purposes; and I made an order which, so far as is material, is as follows:—'The Court being of opinion that the premises comprised in the lease, including the buildings thereon, are used exclusively for charitable purposes, declares that they are exempt from liability, and directs the Commissioner of Valuation to amend the Valuation Lists accordingly.'

"The Commissioner of Valuation being dissatisfied with my decision has, pursuant to the provisions of the Valuation of Rateable Property (Ireland) Act, 1860, by notice in writing duly required me, as Chairman of Quarter Sessions, to state and sign a case setting forth the facts and grounds of such decision for the opinion of one of the Superior Courts of Law at Dublin, and, accordingly, in compliance with such requisition, I state this case.

"The questions for the consideration of the Court are:—

"1. Ought the leasehold premises, and the buildings thereon to be distinguished in the Valuation Lists as being used exclusively for charitable purposes?

"2. Ought the buildings to be so distinguished on the said Lists?

"3. Ought the private chapel to be so distinguished on the said Lists?"

By the lease referred to in the case, the premises comprised therein were granted to the lessees, their successors in office, and assigns, to the intent and purpose that the demised premises might, during the term of the lease, be used only as a site for the residence of the person, for the time being, officiating as the parish priest in the Roman Catholic Chapel or place of worship for the inhabitants of the parish of Drumgoon, and for no other purpose whatever. The lease contained a covenant on the part of the lessees, that they would, within three years, build and finish a parochial house as a residence for the Roman Catholic parish

priest of the parish of Drumgoon, on the said lands at the cost of at least £700. The lease purported to be made by virtue of the Leasing Powers Act for Religious Worship in Ireland, 1855, and expressly incorporated the covenants and conditions implied by the 8th section of that Act.

The Hon. Cecil Atkinson (with him *J. F. V. Fitzgerald, K.C.*), for the appellant :—

We do not contend that a valid charitable trust was not created by the lease of 19th November, 1898. Our argument is, that the premises are not used *exclusively* for charitable purposes, and are not, therefore, within the exemption mentioned in 15 & 16 Vict. c. 63, s. 16, and 17 Vict. c. 8, s. 2. The house here is used not merely for the benefit of the parishioners, but also as a private residence of the respondent, who may receive and entertain what visitors he pleases in it, and generally use it in the same way as the occupier of any other private house. The house is part of the emoluments of the respondent's office. There is, therefore, here a beneficial occupation of the premises by the respondent—a private profit derived by him out of them—and this renders them liable to be rated: *Heron* v. *Monaghen* (1); *The King* v. *Catt* (2); *Representative Church Body* v. *Commissioner of Valuation* (3); *Gambier* v. *Overseers of Lydford* (4); *The Queen* v. *The Inhabitants of Stapleton* (5); *Congreve* v. *Overseers of Upton* (6); *Guardians of Waterford Union* v. *Barton* (7).

P. Law Smith, K.C., and *M'Gonigal*, for the respondent :—

The use here is exclusively for charitable purposes. The word "charitable" must receive the same construction in taxing statutes as in 43 Eliz. c. 4 (Eng.), and 10 Car. 1, sess. 3, c. 1 (Ir.): *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (8); *Guardians of Waterford Union* v. *Barton* (7), *per* Palles, C.B., at pp. 546, 547. The endowment of a parish priest is a charitable

(1) 22 L. R. Ir. 532.
(2) 6 T. R. 332.
(3) I. R. 6 C. L. 561.
(4) 3 E. & B. 346.
(5) 4 B. & S. 629.
(6) *Ibid.* 857.
(7) [1896] 2 I. R. 538.
(8) [1891] A. C. 531.

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purpose, inasmuch as it is for the spiritual benefit of the congregation: *Robb* v. *Dorrian* (1). The respondent is bound to receive parishioners at the house at any hour of the night or day. This distinguishes the present case from the cases in which the residence of a schoolmaster has been held rateable. The respondent, moreover, receives no salary; he has no income, except what is derived from voluntary donations. The accommodation here is not in excess of what is required for the discharge of the duties of parish priest. In no case has it been suggested that the mere right to receive friends and visitors in the house takes the case out of the exemption. [They referred to *Maguire* v. *Guardians of Newry Union* (2); *Hoope* v. *Sir Richard Griffith* (3); *The Queen* v. *Mitchelstown Union* (4); *The Queen* v. *Sterry* (5); *The Queen* v. *Stewart* (6); *Dublin Cemeteries Committee* v. *Commissioner of Valuation* (7); *O'Hanlon* v. *Logue* (8); *Attorney-General* v. *Rev. Francis Healy* (9); 18 & 19 Vict. c. 39, ss. 5, 8.]

At all events, the room used as a chapel is not rateable.

J. F. V. Fitzgerald, K.C., in reply:—

The donations received by the respondent, although voluntary, are not gratuitous; he is bound to render services in return. The whole of his time is not occupied with the duties of his office. He has leisure time which he may employ as he pleases; presumably he engages in farming, since he has a small holding of his own adjoining the premises in question. The case is, therefore, undistinguishable in principle from the case of a schoolmaster.

As to the room used as a private chapel, such use is not charitable: *Hoare* v. *Hoare* (10).

Cur. adv. vult.

(1) I. R. 11 C. L. 292.
(2) 1 Ir. Jur. (N.S.) 518.
(3) 4 Ir. Jur. (N. S.) 222.
(4) 4 Ir. C. L. R. 590.
(5) 12 A. & E. 84.
(6) 8 E. & B. 360.
(7) [1897] 2 I. R. 157.
(8) [1906] 2 I. R. 247
(9) Unreported.
(10) 56 L. J. (N. S.) 147.

The judgment of the Court was delivered by—

PALLES, C. B.:—

There is no doubt that a valid charitable trust was imposed upon the house and premises in question by the lease of 19th November, 1898: 18 & 19 Vict. c. 39, s. 8; *Thornber* v. *Wilson* (1); *Robb* v. *Dorrian* (2). But this circumstance alone is not sufficient to exempt them from taxation. To be so exempt, they must be "used," and "used exclusively," for charitable purposes: 15 & 16 Vict. c. 63, s. 16. Any use of such premises by a person who is not an object of the charity is, to my mind, "a private profit or use . . . directly derived therefrom" within 1 & 2 Vict. c. 56, s. 63, and such a profit or use, if it exists, prevents the premises being used '*exclusively*' for charitable purposes. Thus the question is, Is the occupation of the premises by the Very Rev. respondent, because he is parish priest, a 'private profit or use,' or, in other words, is he, in his character as parish priest, an object of the charity?

Now the charity in the present case is the advancement of religion; and it is not only settled by authority, but it is involved in the character which our law deems necessary to a charity (viz.: that it be "in the nature of a public use") that the trust is charitable because it provides a benefit, not to the clergyman as such, but to the Roman Catholic parishioners of the parish, to whom his ministrations are a benefit. But *he* is not an object of the charity. As put by Lord Redesdale, *arguendo*, in *Grieves* v. *Case* (3), "A gift to provide a surgeon for an hospital is not charitable with regard to the surgeon, but with regard to the persons taken into the hospital to be taken care of."

I desire to be distinctly understood as not deciding that if the main purpose for which a building is used is a charitable one, as is that of an hospital for the gratuitous healing of the poor, the residence therein, as part of their duty, of nurses or a resident physician would necessarily render the use not "exclusively for charitable purposes." I should be prepared to hold quite the contrary. But in the present case, in my opinion, this house was

(1) 3 Drew. 245; 4 Drew. 350. (2) I. R. 11 C. L. 292. (3) 1 Ves. Jun. 549.

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Palles, C.B.

provided for the benefit and convenience of the parish priest, and not as imposing upon him the personal *obligation* of residence there which medical gentlemen and nurses may be subjected to.

Taking the view I do of the case, although *Heron* v. *Monaghen* (1) is not a direct authority, the analogy between it and the present case is very close, when we bear in mind that the exemption insisted on here applies as well to buildings used for public as to those used for charitable purposes. There it was held that a national school teacher's residence, which had been built with money borrowed from the Board of Works through the National Board of Education, was not "used for public purposes" within the meaning of the Acts under consideration here. The Lord Chief Justice there said, and I agree with him, "He" [the teacher] "in reality occupies it as his own private property just as if he had paid a rent in money. It is no more occupied for a public purpose than is the residence of any other person who fills a public situation or department." "It may be ancillary" [to his performing his public duty], "inasmuch as it is necessary for him to have a dwelling-house somewhere."

As to the room used solely as a private chapel for the occupants of the house, Mass being celebrated therein, I hold that the proper and usual place for a parish priest to celebrate Mass was at the common law, and now is, his parish church, and that the use of the room for this purpose is a mere personal use for the private convenience of the parish priest, and is therefore not charitable.

As to the other room, found to be "used for keeping all the parish registers and books, and also things connected with the ministration of the office of parish priest," had the finding been that it was "*exclusively*" used for those purposes, I should have been of opinion that it would have been used exclusively for charitable purposes, and should be so distinguished in the Tables of Valuation. But as it has not been found that it has been so *exclusively* used, the facts found are not sufficient to authorize me to hold that even it is exempt from taxation.

Solicitor for the appellant: *W. M. Lane.*
Solicitor for the respondent: *William Boyle.*

J. G. T.

(1) 22 L. R. Ir. 532.

THE KING (COLLINS) *v.* THE JUSTICES OF COUNTY CORK (1).

K. B. Div. 1906. May 9, 10.

Summary Jurisdiction (Ireland) Act, 1851 (14 & 15 *Vict. c.* 92), *s.* 9, *sub-s.* 3 —*Breaking up road—Jurisdiction over road transferred to Urban District Council—Persons to give consent to breaking up road—Local Government Board (Ireland) Provisional Order Confirmation (Fermoy) Act*, 1886 (49 & 50 *Vict. c. lv*), *s.* 1—*Reviewing previous decision—Constitution of Court to review.*

By sect. 9, sub-sect. 3, of 14 & 15 Vict. c. 92, any person breaking up the surface of a road, or committing any of the other acts specified therein, "unless with the consent of the county surveyor, or by the authority of any presentment," is liable to the fine therein mentioned:—

Held, that, in the case of a road, the jurisdiction, power, and authority over which has been transferred from the Grand Jury to an Urban District Council, the sub-section still applies, subject to the variation that the consent is to be given by the Urban District Council, or their authorized officer.

Dundalk Town Commissioners v. *Dundalk Gas Co.* (20 I. L. T. R. 81) considered.

The King's Bench Division, in a case in which there is no appeal, has power to review, and to refuse to follow, a previous decision of the Court; but before doing so, a Court will be constituted, to which each member will be summoned in order that he may have an opportunity of attending.

CERTIORARI.

The prosecutor was charged before the Justices at Petty Sessions on a summons in which the Urban District Council of Fermoy and their clerk were complainants, with having on the 17th July, 1905, unlawfully broken up the surface of a street in the town of Fermoy "without the consent of the county surveyor or by the authority of any presentment and against the consent of the complainants." On the hearing of the summons proof was given on behalf of the complainants that the prosecutor had

(1) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and ANDREWS, JOHNSON, MADDEN, KENNY, and BOYD, JJ. The case originally came on for argument before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ., but was directed to be re-argued before a specially constituted Court.

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broken up the street in question, but no proof was given that he was not acting with the consent of the county surveyor or by the authority of a presentment. The magistrates convicted and fined the prosecutor.

The prosecutor obtained a conditional order for a writ of *certiorari* to quash the conviction on the grounds:—1. That the conviction and summons disclosed no offence capable of being prosecuted summarily under 14 & 15 Vict. c. 92, s. 9, and the Acts amending same. 2. That from the passing of the Local Government (Ir.) Provisional Order Confirmation (Fermoy) Act, 1886, the county surveyor ceased to be the officer whose consent was required in reference to the said section. 3. That from the passing of the Local Government (Ireland) Act, 1898, and the Adaptation of Irish Enactments Order made thereunder (Art. 3), presentment ceased to be the process referred to in the said section. 4. That the summons and conviction did not negative (*a*) the consent of the officer substituted for the county surveyor, and (*b*) the process substituted for presentment.

Cause having been shown by the Urban District Council of Fermoy against making the conditional order absolute, the present application was on behalf of the prosecutor to make the conditional order absolute notwithstanding cause.

From the affidavits filed on behalf of the prosecutor and Urban District Council, respectively, the following facts appeared:—

In the year 1860 the provisions of the Towns Improvement (Ireland) Act, 1854, were adopted by the town of Fermoy. By the Local Government Board (Ireland) Provisional Order Confirmation (Fermoy) Act, 1886 (49 & 50 Vict. c. lv), it was provided (sect. 1): "From and after the time of the confirmation of this Order by Parliament all jurisdiction, power, and authority with respect to roads, bridges, footpaths, and public works (except public works chargeable to the county at large) within the said Urban Sanitary District" [the town of Fermoy] "vested in the Grand Jury of the county of Cork under any Act or Acts shall be transferred from the said Grand Jury to the said Urban Sanitary Authority" [the Town Commissioners of the town of Fermoy] "and it shall not be lawful for the said Grand Jury after such transfer to make any presentment with regard to any road, bridge,

footpath, or other public work within the said district (except bridges and other public works chargeable to the said county at large), nor shall any land or premises within the said district be liable to Grand Jury cess in respect to any presentment for roads, bridges, footpaths, or public works (except bridges and other public works chargeable to the said county at large)."

By the Local Government (Ireland) Act, 1898, the said jurisdiction, power, and authority became vested in the Urban District Council of Fermoy.

The Urban District Council employed a staff of men to repair the roads, streets, and flagways within the township. The county surveyor of the county of Cork was not an official of the Urban District Council, and had no duties to perform in reference to the roads since the Provisional Order Confirmation Act of 1886. The Urban District Council had not consented to the breaking up of the street.

Conner, K.C. (with him *Linehan*), for the prosecutor:—

The offence charged in the summons is that created by sect. 9, sub-sect. 3, of the Summary Jurisdiction (Ireland) Act, 1851, which makes liable to a fine any person who shall break up the surface of any road or footpath, unless with the consent of the county surveyor, or by the authority of a presentment. We submit that the sub-section applies only to cases where the act would be lawful if done with the consent of the county surveyor, or by the authority of a presentment. The offence is not the breaking up of the road, but the breaking up of it without such consent or authority, and there can, therefore, be no offence except in case of a road with respect to which such consent or authority can be given. In the present case there is no person who can give the consent. The county surveyor cannot give it, because the road is no longer under his control. The Urban District Council cannot give it, because the powers of the county surveyor have not been transferred to them. The Provisional Orders Confirmation Act of 1886 transferred the powers merely of the Grand Jury. The county surveyor was an officer independent of the Grand Jury. He was appointed by the Lord Lieutenant, and was never under the control of the Grand Jury. There was no relationship of master and servant

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between the Grand Jury and him. In order that there should be such a relationship, there must be an existing master; but as soon as the Grand Jury were discharged, they no longer existed. By section 42 of the Grand Jury Act of 1836 the county surveyor was to report to the Grand Jury, but there is nothing in any section to show he was bound to follow their directions or was under their control.

Section 9 of the Summary Jurisdiction Act, 1851, is practically a re-enactment of section 159 of the Grand Jury Act, 1836, and that Act dealt only with roads under the control of the county surveyor. That section 9 of the Summary Jurisdiction Act is really part of the Grand Jury code is further shown by section 18 of 19 & 20 Vict. c. 63.

Dundalk Town Commissioners v. *Dundalk Gas Company* (1) was well decided, and should be followed.

The proper remedy of the Urban District Council is by indictment, or else under the provisions of sect. 72 of the Towns Improvement Act (Ireland), 1854.

[He also referred to *The King* v. *Jukes* (2).]

D. B. Sullivan, K.C., and *Timothy Sullivan* (with them *Healy, K.C.*), for the Urban District Council of Fermoy:—

We contend:—

First, the summons here is good on its face; the magistrates had jurisdiction to enter on the inquiry; sect. 24 of the Summary Jurisdiction Act, 1851, takes away *certiorari* in respect of orders made under that Act; therefore, the present conviction cannot be reviewed by this Court. [Palles, C.B., referred to *The King* (*Roe*) v. *Justices of Roscommon* (3).]

Secondly, sect. 1 of the Provisional Order Confirmation Act, 1886, transferring to the Town Commissioners all jurisdiction, power, and authority with respect to the roads, was sufficient to transfer to them the powers of the county surveyor with respect to such roads.

Thirdly, assuming the Provisional Order Confirmation Act had

(1) 20 I. L. T. R. 81. (2) 8 T. R. 542. (3) [1905] 2 I. R. 101, 112.

not this effect, the powers of the county surveyor are, as to roads within the urban district, transferred to the Urban District Council by sect. 27, sub-sect. 1 (*b*), of the Local Government (Ireland) Act, 1898. What is there declared to be transferred is the "business" of the Grand Jury—a word of the widest character.

Fourthly, even if the contention of the prosecutor is correct, that there is no one now who can give the consent required by sect. 9, sub-sect. 3, of the Summary Jurisdiction Act, still the conviction was right. On proof having been given of the breaking up of the street, the onus lay on the prosecutor to establish matter of excuse: 14 & 15 Vict. c. 93, sect. 20, sub-sect. 1; 40 & 41 Vict. c. 56, sect. 78; *R.* v. *Turner* (1); *Roberts* v. *Humphreys* (2); Paley on Summary Convictions (8th ed.), p. 141. If he is unable to do so by reason of there being no one who can give the consent mentioned in sect. 9, sub-sect. 3, he must be convicted.

The King v. *Jukes* (3) is no longer law: 14 & 15 Vict. c. 93, sect. 20, sub-sect. 1; 40 & 41 Vict. c. 56, sect. 78.

Linehan, in reply:—

Sections 54, 58, 70, 128, and 162 of the Grand Jury Act, 1836, show the personal nature of the office of county surveyor.

With reference to the argument founded on sect. 27, sub-sect. 1 (*b*), of the Local Government Act, 1898, it is submitted that the word "business" in that sub-section can be given no greater effect than the same word in sect. 4, and it could scarcely be contended that the provision of the latter section, transferring to the council of each county the business of the Grand Jury, has transferred to the County Council the powers and duties of the county surveyor as to roads within the county: see Local Government Act, 1898, sect. 115; schedule to Local Government (Adaptation of Irish Enactments) Order, 1899, incorporating sect. 50 of Grand Jury Act, 1836; Local Government (Procedure of Councils) Order, 1899, Art. 8.

14 & 15 Vict. c. 93, sect. 20, sub-sect. 1; and 40 & 41 Vict. c. 56, sect. 78, deal merely with matters of pleading and evidence.

(1) 5 M. & S. 206. (2) L. R. 8 Q. B. 483. (3) 8 T. R. 542.

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THE KING (COLLINS) v. JUSTICES OF CORK.

May 10.

LORD O'BRIEN, L.C.J. :—

As the question involved in this case is of considerable importance, I am glad that I requested the presence of all the Judges of the King's Bench Division to decide it. The broad question is, whether a person who breaks up the surface of a road within an Urban area without the consent of the county surveyor, can be prosecuted summarily, or whether recourse must be had to the cumbrous, dilatory, and expensive procedure by indictment. The statement of the question shows its importance. When the matter came on originally for argument before my brothers Madden and Wright and myself, the *Dundalk Case* (1) was referred to, and it was insisted that it was a precise authority and concluded the discussion; however, as that case appeared to me to be not only unsatisfactorily reported, but unsatisfactory in the conclusion said to be arrived at, I thought it well to have it reviewed by the body of the Judges—a course which I think should be always pursued when it is deemed advisable to review a decision in a criminal case, as it is not the subject of appeal. All the Judges should be summoned, and given an opportunity to attend.

Now in the present case the summons was founded on sect. 9, sub-sect. 3, of the Summary Jurisdiction Act, which provides, amongst other things, that a person who shall break up the surface of any road, unless with the consent of the county surveyor or by the authority of a presentment, shall be liable to a fine. It is not denied that in this case the person summoned did break up a road—a street within the urban district of Fermoy —without the consent or authority mentioned in the section. The question is, Is he amenable to summary jurisdiction, or has the provision of the Fermoy Provisional Order Confirmation Act, which separated the urban area of Fermoy from the county at large, making it a separate area and superseding all functions of the county surveyor so far as relates to the street in question, superseded all procedure except by indictment? This is the basis upon which the case has been argued. I am of opinion that the defendant in the summons still remains amenable to summary jurisdiction, on the ground that all the functions of the county sur-

(1) 20 I. L. T. R. 81.

veyor, exercisable by him as a servant of the Grand Jury, are now vested in the Urban Council of Fermoy, and that the Urban Council are, so far as relates to the matter in question, the representatives of the Grand Jury and of their officer the county surveyor. I am of opinion that inasmuch as the defendant acted, as is averred in the summons and proved, without the consent of the Urban Council; indeed, notwithstanding their refusal to consent, he is amenable to the summary procedure prescribed by the Summary Jurisdiction Act, s. 9, sub-s. 3. The legality of the breaking up of the street under the latter section was made dependent on the consent of the county surveyor because he was, under the Grand Jury, the permanent superintending authority over the roads. The Grand Jury were an evanescent body, and he was the continuing permanent officer, but an officer of the Grand Jury. No doubt he was appointed by the Lord Lieutenant, but he was appointed as the officer of the Grand Jury. His duties are prescribed by the 42nd section of the Grand Jury Act:—[His Lordship read the section]. The Grand Jury made provision for his payment, and he was dismissible by them as well as by the Lord Lieutenant. It is familiar knowledge that originally his appointment was with the Grand Jury themselves, but the power to appoint, in order to prevent favouritism and to secure proper qualification and efficiency, was transferred to the Lord Lieutenant; but when the Lord Lieutenant appointed, the person so appointed became the officer of the Grand Jury. Now let me turn to the Fermoy Provisional Order Confirmation Act:—[His Lordship read sect. 1 of the Act]. This obviously means all power and authority, whether exercisable by them, the Grand Jury, when assembled, or by their officer, the county surveyor, when they were dispersed, and these powers were vested in a permanent continuing body, now the Urban Council. The Council now represents the Grand Jury and its officer, the county surveyor, and possesses the powers exercisable by both. Accordingly, I am of opinion that, having regard to the legislation which has taken place, the 9th section, sub-sect. 3, of the Summary Jurisdiction Act is now to be read as if the words "Urban District Council, or their officer lawfully authorized in that behalf," had been substituted for "county surveyor," and that, as what the defendant did was done without the consent of the

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Urban Council or of any officer by them lawfully authorized, he was rightly convicted.

Reliance has been placed on the 27th section of the Local Government Act. I do not wish to call in aid that section, though perhaps it might be called in aid. I decide this case, and have always thought it should be decided, upon the Fermoy Provisional Order Confirmation Act, and the fact that the county surveyor was an officer of the Grand Jury.

With reference to the *Dundalk Case* (1), all I say is that I think it is very hard to find out from the case what the precise grounds of decision were; but if it in any way conflicts with the judgment of the Court in the present case, it is to be considered as overruled. No costs.

PALLES, C.B.:—

I agree in the judgment of the Lord Chief Justice; but as the case is a peculiar one in many ways and undoubtedly important, I should like to add a few words.

I believe this is the first time that this Division, since the amalgamation of the three former Divisions, has found it necessary to consider the course it should adopt when the question before it involved a possible refusal to follow a former decision. It was laid down many years ago, in a well-known case in England (*Hadfield's Case*) (2), that where a Court was exercising a peculiar jurisdiction, such as that of the Queen's Bench on appeals from Quarter Sessions, that of the Common Pleas on appeals under the Registration Acts, or that of the Exchequer in matters of revenue, the principle that the Court was bound by its previous decision did not apply. The application of that principle was considered in this country by the Court of Appeal in *Ladd* v. *O'Toole* (3), a registration case, and the Court there arrived at the conclusion that although for convenience sake it, as ordinarily constituted (say of three or four Judges), should not, without consultation with the other Judges of the Court, decline to follow a previous decision, yet in a case in which there was no appeal, if we thought that there was sufficient ground for reconsidering

(1) 20 I. L. T. R. 81. (2) L. R. 8 C. P. 306-313. (3) [1904] 2 I. R. 389.

the previous decision, a Court would be constituted to which each member would be summoned—not necessarily that every member should attend, but that each should have an opportunity of doing so—and that such a Court so summoned might exercise the undoubted right of the Court of refusing to follow its previous decision. This is the course which has been adopted by my Lord Chief Justice in the present case, and it enables us to reconsider the former decision.

The importance of the case which is thus open for our consideration cannot be exaggerated. Because, as it would be impossible to hold that the offence created by sub-section 3 of section 9 of the Summary Jurisdiction Act (14 & 15 Vict. c. 92) continued to exist if there were not a person in existence capable of giving the consent which the sub-section contemplates may be given by the county surveyor, the necessary result of the argument for the applicant being right would be that the protection afforded to road authorities by this sub-section would cease to exist in all urban districts, and that in these districts the only remedy for an interference with the road, however slight, would be the expensive process of indictment. Thus practically the protection would cease to exist. This being so, it is satisfactory that the case has been so fully argued. Every member of the Court has given it the fullest consideration, and I proceed to state in a few words the grounds on which I have formed my opinion.

A Grand Jury was an evanescent body. Its life was limited to the duration of the one assizes at which it was empanelled. In former times, when it was charged with the fiscal matters of the county, the business was transacted by means of successive bodies of this nature empanelled at each assizes, none of them being in strictness the successor of the other. Therefore every officer, or perhaps I should say every *quasi*-officer, appointed by the Grand Jury was in a sense an 'independent' officer, as he had no principal behind him; but in substance he was the officer or servant of the county. He performed his assigned duties for *the county*, and was paid by *the county*; but, as a necessary corollary from the nature of the Grand Jury, the duty of performing those matters which the Act directed to be done for the county was thrown on the officer directly, and not upon the Grand Jury, to be

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performed by the officer. Had such a duty been thrown on the Grand Jury, it would have been impossible to have enforced it, because, from the very nature of the body, neither action, indictment, mandamus, nor any other proceeding known to the Common Law would, in practice, have been applicable.

The Grand Jury, however, had, with one exception, to which I shall afterwards refer, the power of appointing the officers. They were the body representing the county, and all work done by these *quasi*-officers was done for the Grand Jury as representing the county, although the relation of master and servant did not exist between them.

The exception I have referred to was the appointment of the county surveyor. He was appointed by the Lord Lieutenant, but was liable to be dismissed either by the Lord Lieutenant or by the Grand Jury. I am satisfied, as well by the history of the country as by the Act itself, that the reason the appointment of that officer was vested in the Lord Lieutenant was for convenience and for securing efficiency. This seems to be clear from the 39th section of the Grand Jury Act, 1836 (6 & 7 Wm. 4, c. 116), which provides for an examination being held for candidates for these offices. If that examination had not been held by a central authority, it would have been necessary that an examination should have been held by each separate county at the time of nomination. The view of Parliament was that one examination should be held, at which a number of qualified candidates should be ascertained, and that, on a vacancy occurring in a particular county, the person to fill the vacancy should be selected out of the candidates who had passed, instead of a separate examination being held previously to each appointment. The Lord Lieutenant was selected as the central authority; and as the examination was held under his direction, the selection of the candidates to fill particular vacancies was left to him; and I hold that the mere fact of the appointment having been in the Lord Lieutenant did not prevent the acts of the county surveyor being acts done for the Grand Jury, although, as I have said, the relation of master and servant did not exist between them.

For these reasons, I am of opinion that the appointment of the county surveyor being vested in the Lord Lieutenant does not introduce any difficulty.

Further, it appears to me clear that sub-sect. 3 of sect. 9 of the Summary Jurisdiction Act, upon which the present prosecution is brought, is *in pari materiâ* with the Grand Jury Act, because it is plain that that sub-section and the cognate provisions in the Summary Jurisdiction Act were substituted for sections 156–161 and 163 and 164 of the Grand Jury Act, which were repealed.

The object of the Provisional Order Confirmation (Fermoy) Act, 1886, was to place the Urban Sanitary Authority, now represented by the Urban District Council, in respect of the roads transferred to them, in exactly the same position as the Grand Jury had previously been. The obligation to keep these roads in repair was thrown upon the Urban Sanitary Authority, and one of the objects of transferring "all jurisdiction, power, and authority with respect to roads" was to enable this obligation to be fulfilled. It seems to me to follow that *primâ facie* every power which was given directly or indirectly to the Grand Jury for the purpose of effecting the repairs of the roads must be deemed to have passed, unless a contrary intention appears. I have shown that these powers could not have been given directly to the Grand Jury, but must necessarily have been vested in their officers; but those officers had those powers *quâ* officers, and in order that they might carry out the duty of the county of keeping the roads in repair; and in my opinion every power given to the officers, including the county surveyor, for that purpose must be taken to have passed to the new authority, the Urban Sanitary Authority.

What were these powers? First, the power, referred to by Mr. Sullivan, contained in the final clause of sect. 9 of the Summary Jurisdiction Act, under which the order which might be obtained from the Justices was in the nature of an order for the abatement of a nuisance. It was necessary that this power should have passed to the new authority. But the power could not be exercised except upon the application of the county surveyor, which, since the Grand Jury could act only through its officers, I read as meaning—upon the application of the Grand Jury acting through their county surveyor. When that power was transferred, as I hold it was, to the new body, which was a corporation, and capable of themselves performing it by persons who might be either in the relation of independent officers, or

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might be their servants in the strict sense, as was held in *Foreman* v. *The Mayor of Canterbury* (1), this power, and the other powers incidental to the repairs of the transferred roads, passed, not to any particular officer, for the officers were not transferred, but to the new authority itself, which, as constituted under the Act, was *per se* capable of being burthened with, and of performing, duties.

I distinguish the particular statutable transfer from such a transfer as was effected under the Judicature Act, where the transfer was not of jurisdiction only from one Court to a new Court, but included a separate transfer of officers, each burthened with and carrying with him the duties of his office. In the present case the duties are transferred to the corporate body represented by the present complainants, who, being a corporation, burthened with a duty, have the power and obligation of appointing such officers as they think right for that purpose. An officer appointed by them to perform the duties formerly performed by the county surveyor would be an officer capable of giving the consent required by sub-sect. 3 of sect. 9 of the Summary Jurisdiction Act, and therefore the sub-section exists in its integrity, subject only to a variation as to the person enabled to give the consent. The present complainants may either give the consent themselves, or through an officer such as I have mentioned, should they think it necessary to appoint one. But even were such an officer appointed, the consent of the complainants would be sufficient.

ANDREWS, JOHNSON, MADDEN, KENNY, and BOYD, JJ., concurred.

Solicitor for the prosecutor: *R. S. Baylor.*

Solicitor for the Urban District Council of Fermoy: *Anthony Carroll.*

J. G. T.

(1) L. R. 6 Q. B. 214, at p. 217.

THE KING (WILLIAM HASTINGS) *v.* THE CHAIRMAN AND JUSTICES OF GALWAY (1).

K. B. Div.
1906.
May 3.
June 12.

Justices—Acquittal—Bias—Order—Voidable, not void—Certiorari—Nemo debet bis vexari, &c.

An order of acquittal made by a Chairman and Justices of Quarter Sessions (assuming one of the Justices to have been biassed) cannot be quashed on *certiorari*.

The order of a biassed tribunal is voidable only, not void.

MOTION to make absolute a conditional order of *certiorari* to bring up to be quashed an order of the Chairman and Justices of Galway, sitting at Ballinasloe, on the 25th October, 1905, on the hearing of an appeal of John L. Beegan against a conviction made at the suit of William Hastings against John L. Beegan at Ballinasloe Petty Sessions on the 8th January, 1905, reversing the order of the magistrates with 40*s.* costs. The conviction by the magistrates was a conviction under the Local Government Application of Enactments Order, 1898, Article 12 (4), for acting as a member of the Ballinasloe Urban District Council when disqualified from so acting by reason of being himself concerned in a contract with the County Council of Galway, in the Rural District Council of Ballinasloe, for the work of inscribing Irish characters on milestones, the property of the County Council. Upon the conviction a fine of £1 1*s.*, together with 1*s.* 6*d.* for costs, was imposed, or in default of payment imprisonment in Galway Gaol for a period of one fortnight without hard labour unless said sums be sooner paid. The appeal from the conviction came, on the 25th October, 1905, before the Quarter Sessions consisting of His Honor Judge Anderson and Thomas Byrne, J.P., who reversed the conviction with costs against the prosecutor. The prosecutor alleged that the Court was improperly constituted by reason of the adjudication of Thomas Byrne, he

(1) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and ANDREWS and KENNY, JJ.

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being a person prejudiced and biassed against the prosecutor and in favour of the accused by personal relations with him, and he made an affidavit containing the following statements :—

"Thomas Byrne was a director of the Ballinasloe Printing and Publishing Company, and the defendant was a shareholder in the same Company, which Company printed and published a newspaper called *The Connaught Leader*. This paper was a rival paper of *The Western News*, a paper printed and published by the prosecutor in Ballinasloe for several years. The two rival papers had been engaged in bitter conflicts and controversies, and there had been a great deal of litigation (civil and criminal) between the directors of the Ballinasloe Printing and Publishing Company and the prosecutor. In February, 1905, the prosecutor took proceedings against Thomas Byrne and the other directors of the Company, and sought to have them bound to the peace for malicious libels and inciting to assault, which libels were at present the subject of a civil action in the High Court of Justice. At the time Thomas Byrne adjudicated he was personally, with the other directors of the Company, defendant in a prosecution by the prosecutor under the Companies Acts, and was subsequently fined in the sum of £5 for having failed for several years to make the annual returns necessary to be made under the Companies Acts. By reversing the conviction of John L. Beegan on appeal, the business of Thomas Byrne and John L. Beegan in the newspaper aforesaid was substantially benefited by the active influence of John L. Beegan at the Urban Council Board in procuring contracts for printing and advertising from the Board for the Company at prices higher than the complainant's tenders. Thomas Byrne was interested in stuffing the public Boards with shareholders of the Company of which he was a director, that they might directly or indirectly influence all contracts for printing and advertising at these Boards of which he was himself a member, which Boards had now for years accepted the highest tender from his Company; and the removal of John L. Beegan from two of these Boards, on the conviction had, would, if not reversed, be a direct financial loss to the Company of which Thomas Byrne was a director."

He further alleged that Thomas Byrne was, at the date referred to, president of a political organisation known as the Ballinasloe

branch of the United Irish League, and John L. Beegan was secretary of the same branch, and that for this reason also Thomas Byrne was biassed in favour of John L. Beegan. "On the hearing of the appeal, and before the case was gone into, I objected strongly to the constitution of the Court. On some of the grounds I appealed to Judge Anderson for an expression of opinion as to the propriety of Thomas Byrne adjudicating; but the learned Judge refused to interfere beyond saying that the said Thomas Byrne adjudicated at his own risk."

Thomas Byrne made an affidavit in which he stated that the sole ground of objection raised at the Quarter Sessions was that he was president of the local branch of the United Irish League, and that the defendant was a member of the same branch. As a matter of fact, he was not then, nor was he now, president of the branch; but in any event he did not consider that his judgment would in any way be interfered with by the fact that the defendant and he were both members of the same political organisation. It was true that he was a director of the Ballinasloe Printing and Publishing Company; but, at the time of the adjudication in this case, no prosecution was pending against the Company at the suit of the prosecutor, it having been disposed of at the previous Sessions. Until he read the conditional order, he was not aware that John L. Beegan was a shareholder in the Company. The case was really decided by the presiding Judge on a point of law, without any reference to him for his opinion on the merits.

Bartley, for the prosecutor:—

The acquittal by the Quarter Sessions should be quashed, on the ground that Byrne was biassed. There is jurisdiction to quash an acquittal pronounced by an unauthorized tribunal, without infringing the principle, *Nemo debet bis vexari*, &c., because the accused was never in peril. It was decided in *In re Hopkins* (1) that when an appeal is determined at Quarter Sessions by magistrates, some of whom are interested in the matter, the proceeding is null. So the acquittal here is a nullity—not voidable, but void.

(1) E. B. & E. 100.

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In *Re Hopkins* (1) was never overruled. It is plain from the judgment of Gibson, J., in *The Queen* v. *The Justices of Waterford* (2), that bias is to be placed in the same category as corruption, fraud, &c., and that when a tribunal is affected by bias, the accused is never in peril. In this case the accused had been convicted by the magistrates, and he exposed himself to no peril by appealing to Quarter Sessions. He appealed in order to escape peril. It is impossible to distinguish this case from *The King* (*M'Grath*) v. *Chairman and Justices of Clare* (3).

Henry, K.C., and *Macdermot*, for Thos. Byrne, showing cause:

An order made by a biassed tribunal is voidable only, and not void. Until such an order is quashed, it is a legal order; and imprisonment under such an order is legal imprisonment. Therefore, the accused was in peril of legal imprisonment, and the principle, *Nemo debet bis vexari*, &c., applies. In *The Queen* v. *Russell* (4), Lord Campbell said: "If there be an improper conviction, it should be set aside; but I hope that the same practice will never prevail in the case of acquittal." [The following cases were also referred to: *R.* v. *The Justices of Surrey* (5) and *In the Matter of M. C. Newton* (6).]

Bartley, in reply.

Cur. adv. vult.

June 12.

LORD O'BRIEN, L.C.J.:—

The question in this case must often have arisen, and the fact that it is not concluded by express authority tends to show that there is no substantial foundation for the arguments put forward on behalf of the applicant here. The question is this—Can an order of acquittal pronounced by Justices at Petty Sessions, or by a Chairman and Justices at Quarter Sessions, one of whom was biassed, be brought up on *certiorari* and quashed, so that the accused may be subjected to trial again? There is no instance in the history of our law of an acquittal under such circumstances being brought up on *certiorari*. What is the principle? That a man cannot be put in peril twice for the same offence. Was this

(1) E. B. & E. 100.
(2) [1901] 2 I. R. 548, at p. 562.
(3) [1905] 2 I. R. 510.
(4) 3 Ell. & B. 942.
(5) L. R. 5 Q. B. 87, 466.
(6) 13 Q. B. 716.

man put in peril before the tribunal that is alleged to be biassed? I am of opinion that he was, and for this reason, that the order of a biassed tribunal is voidable only, and not void. That such an order is voidable only, and not void, clearly follows from the case of *Dimes* v. *The Grand Junction Canal Co.* (1)—a familiar case, and one of the highest authority. Now, if the order is voidable only, and not void, the accused was in peril when he stood before the tribunal. Though in this case he was acquitted, he might have been convicted. He was certainly in peril, because he might have been arrested and imprisoned on a voidable order, and a very considerable time might elapse before a voidable order could be avoided by proceedings by way of *certiorari*. Until avoided, a voidable order justifies both arrest and imprisonment.

Although there is no decided case precisely in point, some references have been made to the question in recent times. One of the cases to which I refer is *The Queen* v. *The Justices of Antrim* (2). I may, perhaps, be permitted to refer to what I said in that case. At pages 635, 636 I am reported to have said:—

> "The offence with which Love, the defendant in the summons, was charged is one punishable by fine and imprisonment, and the order sought to be quashed is one of acquittal. In the whole range of our law there is no precedent for the granting, or even the making, of such an application in a case where there has been an acquittal by the magistrates. Not only is the application unwarranted by precedent, but principle cannot be referred to in support of it: on the contrary, to grant this application for a writ of *certiorari* to quash the order for acquittal, and for a writ of mandamus to compel the magistrates to rehear the complaint, would be to act in disregard of one of the most deep-rooted principles of the law. It would be a direct infringement of the principle that no one is to be tried twice for one and the same offence."

Perhaps I should not have referred in this bald way to the maxim. It would have been strictly applicable if I had expressly added, "if he had been in peril at the first trial." But, after all, is not this involved in what I did say? I referred in immediate connexion to what Lord Coleridge said in *The Queen* v. *Duncan* (3). I quoted his words, which were as follow:—

(1) 3 H. L. C. 759. (2) [1895] 2 I. R. 603. (3) 7 Q. B. D. 198.

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> "'The practice of the Courts has been settled for centuries, and is—that in all cases of a criminal kind, *where a prisoner or defendant is in danger of imprisonment*, no new trial will be granted if the prisoner or defendant, *having stood in that danger, has been acquitted*.'"

That is the principle, as I understand it, contained in the maxim, "*Nemo debet bis vexari pro una et eadem causa.*" I go on—

> "If the case were one where the tribunal was *ex facie* wholly unauthorized and the accusation and the accused plainly *coram non judice*, the matter would be entirely different. In such a case the pretended adjudication of the usurping tribunal would appear to be a mere nullity—not merely voidable, but void."

I take the very distinction there. Further on I say—

> "Nor do I stop to consider the case of an acquittal brought about by the fraud of the accused and the corruption by him of the presiding tribunal."

I say the same with reference to this case. Later on, in the case of *The Queen* (*Drohan*) v. *The Chairman and Justices of Waterford* (1), I say:—

> "I entirely adhere to the views expressed in my judgment in *Reg.* v. *The Justices of County Antrim*."

And I do so now, expressing them, perhaps, a little more fully. I explicitly stated in *Drohan's Case* (1)—

> "That if an order of conviction by an otherwise competent Court were set aside for bias, a defendant could not again be put on trial because the conviction was voidable, not void."

That is the point of the decision, and that such a conviction is voidable, and not void, plainly appears from the judgment of the Court in *Dimes' Case* (2). Lower down in *Drohan's Case* (1) I find that I make an observation which appears to me to be much in point:—

> "In the *Antrim Case* ([1895] 2 I. R. 603) Lord Justice Holmes did not decide the point, and very rightly. I had expressed my opinion; my brother, the late Mr. Justice O'Brien, had gone still further; and Lord Justice Holmes, having regard to some sweeping expressions of

(1) [1901] 2 I. R. 548. (2) 3 H. L. Cas. 759.

my lamented brother O'Brien, desired to guard himself from assenting to those views. In *Reg.* (*Blakeney*) v. *Justices of County Roscommon* ([1894] 2 I. R. 158) it was argued, unsuccessfully, that a decision of Justices returning a man for trial could be removed and quashed on *certiorari*; but the Court there held that this could not be done: and the Lord Justice, in concurring, referred (page 179) to the fact that *it was incomprehensible, if the jurisdiction existed, that this had never been done. Equally in such a case as the present, it seems incomprehensible, if the power exists, that no instance can be adduced of an order of acquittal being quashed on* certiorari *in this Court.*"

Having regard to the effect of these decisions and the expressions of opinion of the Judges who took part in them, I am clearly of opinion that this application for a writ of *certiorari* must be refused.

PALLES, C. B.:—

The question here is a difficult one, and one upon which there was a difference of opinion amongst the Judges of this Division in *The Queen* v. *The Justices of Antrim* (1). It is, whether the fact that one of the members of a tribunal, which in all other respects is a duly constituted Court of competent jurisdiction, is affected by bias, or is interested, deprives an acquittal by that tribunal of its otherwise conclusive effect.

That this bias or interest does largely affect the jurisdiction of the tribunal is admitted. Its decision, were it a conviction, would undoubtedly, for this reason, be liable to be brought up by *certiorari* and quashed.

But an acquittal does not, in respect of its binding efficacy, stand upon the same footing as a conviction. "If there be," says Lord Campbell, C.J., in *The Queen* v. *Russell* (2), "an improper conviction, it should be set aside; but I hope the same practice will never prevail in the case of an acquittal."

The binding effect of an acquittal depends upon the essential principle of English law, that in a criminal proceeding "the defendant ought not twice to be put *in peril* for the same cause" (2) —a principle which has been acted upon as far back as our records extend.

(1) [1895] 2 I. R. 603.

(2) 3 E. & B. 942.

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Was, then, the defendant here "in peril" when he was before the Quarter Sessions? Or, in other words, might that tribunal have subjected him to *lawful* imprisonment, by which I mean imprisonment which he could not have treated as a trespass? If it might, then the reason the imprisonment would not have been a trespass would have been because it was an act done under the authority of the Court; and if the defendant has been "in peril" of such imprisonment, then, having been acquitted *in fact*, he cannot be allowed to be put "in peril" again for the same cause; and if he would be in such second peril, were we to quash the record of his acquittal by *certiorari*, we must refuse the writ.

Thus, the question comes to one which has been long settled. Had the defendant been convicted at Quarter Sessions, and endured imprisonment thereunder, pending an application, ultimately successful, for a *certiorari*, would that imprisonment have been justifiable, or would it have been an actionable trespass? To state that question is to answer it. A conviction of the defendant by the Quarter Sessions under the circumstances here, would have been not *void, ab initio*, but only *voidable*; and persons acting under it, until it was actually quashed, would *not* have been trespassers.

This is the basis of the opinion given by the Common Law Judges to the House of Lords in the celebrated case of *Dimes* v. *The Grand Junction Canal Co.* (1)—an opinion which was adopted by each of the learned Lords who took part in that decision—the Lord Chancellor (Lord St. Leonards), Lord Brougham, and Lord Campbell. The question there, as is well known, was the competency of Lord Cottenham, when Lord Chancellor, to hear a cause to which an incorporated company in which he was a shareholder was a party; and the incompetency to adjudicate by reason of bias which is relied on here may, for the purpose of the present case, be treated as identical with that there held to have been caused by the interest of the Lord Chancellor.

The first question proposed to the Judges in that case was—"Was this a case in which the order and decree of the Lord Chancellor were void, on account of his interest and of his having decided in his own cause?"

(1) 3 H. L. Cas. 759.

The unanimous opinion of the Judges, as delivered by Parke, B., afterwards Lord Wensleydale, was: "The order or decree of the Lord Chancellor was *not absolutely void, but voidable* only."

In stating their reasons for this opinion, after premising that had the proceeding been one of a Court to which a prohibition might go, a prohibition would have lain; and that if no prohibition had been applied for, and in cases where it could not have been granted, the proper mode of taking the objection to the interest of the Judge would be, in Courts of Common Law, by bringing a writ of error for error in fact, and assigning that interest as cause of error, Baron Parke referred to *Brooks* v. *Earl Rivers* (1) as an instance in which the former course, and to *The Company of Mercers and Ironmongers of Chester* v. *Bowker* (2) as one in which the latter course, had been resorted to. He then adds these words:—

> "In neither of these cases was the judgment held to be absolutely void. Till prohibition had been granted in the one case, and judgment reversed in the other, we think the proceedings *were valid*, and the persons acting under the authority of the Court would *not* be liable to be treated as *trespassers*."

His next sentence comes much closer to the present case, as he refers to the analogy afforded by a case such as the present:—

> "The many cases in which the Court of King's Bench has interfered (and may have gone to a great length) where interested parties have acted as magistrates, and quashed the orders made by the Court of which they formed part, afford an analogy. *None of these orders is absolutely void.* It would create great confusion and inconvenience if it was. The objection might be one of which the parties acting under these orders might be totally ignorant till the moment of an action of trespass for the act done; but these orders may be quashed after being removed by *certiorari*, and the Court shall do complete justice in that respect."

As, then, the defendant might have been *lawfully* imprisoned under an order made by the Court of Quarter Sessions on the hearing, notwithstanding this defect in its constitution, I am of opinion that the *certiorari* should be refused.

(1) Hardr. 503. (2) 1 Stra. 639.

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It is, I hope, wholly unnecessary to say that this reasoning has no application to a so-called decision by a tribunal wholly unauthorized, or to a decision which, for any other reason, is void *ab initio*. As to that, I entirely concur with Holmes, L.J., when he says, in *The Queen* v. *Justices of Antrim* (1) :—

> "The plea of *autrefois acquit* or *autrefois convict* implies a previous acquittal or conviction by a Court of competent jurisdiction."

That was the ground of my decision in *The King* v. *The Chairman and Justices of Antrim* (2). The Lord Justice proceeds :—

> "A verdict of not guilty of high treason by a jury at Quarter Sessions, the dismissal on the merits of a charge of rape by Justices at Petty Sessions, the conviction by a court-martial for felony or misdemeanour of a person not subject to the military code, would, as far as I am aware, afford no protection to the accused when impleaded before a competent and properly constituted tribunal."

In those cases, however, the acquittal would have been void *ab initio*.

The prosecutor relies on *The King* (*M'Grath*) v. *The Chairman and Justices of Clare* (3); but the decision there was based on there not having been a *decision on the merits* in fact. By reason of an erroneous decision on a preliminary point, the Justices declined to consider the merits; and on that ground we distinguished the case from *Reg.* v. *Justices of Middlesex* (4). I expressly guarded myself there against expressing an opinion on this question. I said that the question discussed in *The Queen* v. *Justices of Antrim* (1) did not arise there, as the order did not proceed to acquit. In saying this, I did not say that an ordinary reversal on appeal of a conviction by magistrates would not amount to an acquittal; but I held that as it appeared on the face of the order of Quarter Sessions there that they had not heard the case, it was not an acquittal. It was no more an acquittal than the order of Quarter Sessions in *The King* v. *The Chairman and Justices of Antrim* (2).

In my opinion, the *certiorari* should be refused; but as the only person before us who opposed its issue is the Justice who,

(1) [1895] 2 I. R. 603.
(2) [1906] 2 I. R. 298.
(3) [1905] 2 I. R. 510.
(4) 2 Q. B. D. 516.

the opinion of the Court, acted improperly, the refusal must be without costs.

ANDREWS, J. :—

I am of the same opinion, and have nothing to add.

LORD O'BRIEN, L.C.J. :—

Mr. Justice Kenny, who is engaged elsewhere, is unable to attend. He concurs in the judgment of the Court.

Solicitor for the prosecutor: *James Dickie.*

Solicitor for Thomas Byrne: *P. Golding.*

J. L.

CUMMINS *v.* MURRAY (1).

Probate—Practice—Costs—Special order, allowing unsuccessful defendant in Probate suit his costs out of the estate—Judicature Act (Ireland), 1877, sect. 53.

Where, in a Probate suit, tried before a Judge and jury, the Judge at the trial made a special order, allowing the unsuccessful defendant, who had pleaded undue influence on the part of the plaintiff, his costs out of the estate :—

Held, that, provided there are any grounds on which the Judge can base such special order, there is no jurisdiction to interfere with an order so made in exercise of his discretion.

Probate suits are on a special footing in this respect.

APPEAL from an order of Johnson, J., by which defendant was allowed his costs out of the estate. The action, which was tried before a Judge and jury, was a Probate suit; and the jury found in favour of the will propounded by the plaintiff, against whom the defendant had alleged undue influence. Cummins, the plaintiff, was executor and principal beneficiary under the testator's last will. Murray, the nominal defendant, was the executor of a prior will, under which certain relatives of the testator, named Sheerin, were the chief beneficiaries. The special circumstances of the case appear from the judgment.

(1) Before GIBSON, BOYD, and WRIGHT, JJ.

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Magrath, K.C., and *James O'Connor*, for the plaintiff:—

Costs cannot be given to a defendant who has unsuccessfully pleaded undue influence, even if in a proper case he may be exonerated from costs. This order, in effect, is contrary to the finding of the jury. It can only be based on evidence which the jury by their verdict showed they did not believe.

The Solicitor-General (*Barry, K.C.*), and *P. Nolan*, for the defendant.

[All the authorities cited on either side are referred to in the judgment.]

The judgment of the Court was delivered by—

GIBSON, J.:—

This is a motion that defendant, who had been allowed his costs by my brother Johnson, should be ordered to pay the costs of the action. No question of priority between plaintiff's and defendant's costs is raised, and the question before us is whether the learned Judge had materials before him to justify his order. If he had not, his order must be discharged. If he had such materials, the mode in which he exercised his discretion cannot be reviewed: *Bostock's Case* (1); *Williams* v. *Ward* (2).

It is conceded that the established principles on which the Court of Probate used to act, in exonerating an unsuccessful defendant from costs and in giving him costs, are still applicable: *Wilson* v. *Bassil* (3); *Browning* v. *Mostyn* (4); and that a special order made in accordance with those principles would be unimpeachable. This is the settled practice in testamentary cases, though section 53 of the Judicature Act has introduced greater strictness in the exercise of judicial discretion. Order XXI., R. 18, recognises the existing Probate practice; and, though that rule may only relate to cases tried by a Judge without a jury, it supplies a useful indication to guide the application of discretion. The analogous English rule has been held to govern, whether there be a jury or not: *Davies* v. *Jones* (5).

(1) [1900] 2 Q. B. at p. 621. (2) 55 L. J., Q. B. 566. (3) [1903] P. 239. (4) 66 L. J., P. 37. (5) [1899] P. 161.

The order, which is in a somewhat unusual form, recites portions of the evidence considered by the Judge to be material, and in its curial part declares that the acts and conduct of the testator and Cummins in the entire transaction involved such grave suspicion that the Sheerins were fully justified in contesting the case, and accordingly the defendant was given his costs out of the assets. One or two of the matters in the evidence referred to in the order—such as the testator's denial of the will and Langan's evidence—do not appear to me of much weight; but I cannot substitute my opinion for that of the Judge; and, even if he was wrong as to these small matters, this cannot determine our decision, if there was adequate material on which the Judge acted, if the order, on the whole, discloses what he might deem good special cause. Suppose, however, that the order was on its face erroneous, and we were compelled to discharge it, I am not satisfied that this Court, the order being removed out of the way, could not itself, if the entire materials before it justified such course, make a good special order in the exercise of its jurisdiction: *Buckley's Case* (1); *Myers* v. *Defries* (2). The point, however, does not now require to be decided. If the Judge had refused to make a special order, his decision would be final.

Plaintiff's counsel contend that the Judge cannot base his order on anything contrary to the findings of the jury: *Harnett* v. *Vise* (3). It is obvious, however, that the mere fact of an adverse verdict on specified issues cannot exclude judicial discretion as to costs, which can only arise when the defendant is defeated. The judgment in *Harnett* v. *Vise* (3) is a good illustration of this; also *Bostock's Case* (4). The function of the Judge in disposing of costs is quite different from that of the jury, who deal only with specific questions. The Judge must consider matters which cannot be directly found by the jury, such as the state of the testamentary papers, the conduct of the testator, the conduct of the parties connected with the testamentary documents, and the entire circumstances under which the will came to be executed. The jury may find for a will, and yet the circumstances may be such

(1) 22 L. R. Ir. 579.
(2) 4 Ex. D. 176.
(3) 5 Ex. D. 307.
(4) [1900] 2 Q. B. 616.

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that the litigation was justifiable, as, for example, where a will was made by a lunatic during a lucid interval, or by a person suffering from delusions, or in favour of a person who was *dux facti*. The verdict only controls the Judge's discretion to the extent of the issues found and the evidence directly necessary to support such issues. There is no anomaly in this. Even in a criminal case the Court may bind over an accused person who has been acquitted, if on the general evidence it is satisfied that security for the peace should be required. To hold that the jury should specifically find the truth of the matters on which the Judge bases his special order, would paralyse the exercise of judicial discretion, and is contrary to all the authorities relating to good special cause: *Bostock's Case* (1).

Nor, for the same reasons, can I assent to the view, contrary to all experience and probability, that the verdict is to be construed as importing that all the evidence of witnesses called in support of the will is true, and that all the evidence of the defence is false. The Judge must act on his own view of the entire case; but he must assume that the verdict is correct, and he should be cautious not to act on evidence which he thinks the jury probably disbelieved. If there are materials to justify a special order, the order is not appealable, and we cannot interfere with the Judge's discretion. Without referring at all to any other facts than those admitted on both sides, and discarding all defendant's evidence as to intoxication on December 21st, &c., I think the special order here was warranted by the recognised rules by which testamentary costs have been governed.

I do not state the evidence in detail. The unquestioned facts were these: the testator, a small farmer of advanced years, made an officious will in favour of his wife and grand-nephews in 1900. After his wife's death, in 1903, he became addicted to intemperate habits, squandering his money in Cummins' public-house and elsewhere. He was twice convicted of drunkenness in 1904, once in July for riotous behaviour, and again in August for being found drunk in the street. In the same year he received out of Court £84 10s., on August 13, a cheque for £30, and later a cheque for

(1) [1900] 2 Q. B. 616.

£4, the endorsement of which was not in his writing. All this money had disappeared at the time of his death. He had an account with Cummins for goods up to his death—one of the items of which was for payment of rent. He had fallen into dirty habits, sleeping in his clothes. The Sheerin family treated him apparently kindly and with attention, but remonstrated with him as to his objectionable and drunken mode of life. This was the cause of his changing his will, which, when he visited Magee on December 14th, he said he wanted to "break," the reason given being that the Sheerins were bad boys, and had done nothing for him. The will propounded was made on December 21st. He was minded to sell his farm to Cummins (with whom he had an account, and in whose house he used to drink) for £170. Instead of this, he made a sudden bargain on December 21st with Cummins to make a will in his favour if the latter would support him. He was in bad health at the time, and took to his bed next day, and died in a fortnight. There was nothing in the scripts to explain or account for the will. Cummins was not therein named as residuary legatee, and there was not a word about this extraordinary bargain in the scripts. Cummins was about the office of Magee (who was his regular solicitor) the whole time of the preparation of the will, and on the same day purchased from testator his sole remaining stock, consisting of two head of young cattle, at £13, which sum was not paid, it being only credited against the shop account; £5 of this was afterwards struck out, as one of the animals died after the purchase—a method of book-keeping which is not reconcilable with ordinary law, if Cummins was owner at the time of such death. I say nothing as to the evidence of the two clergymen, neither of whom says much to support this will; nor do I dwell on the strange matrimonial episode which represents the testator in a silly light.

Putting oneself in the Sheerins' position, who claimed under an officious will, replaced by a will made in favour of the publican in whose house the testator used to drink, looking at all the circumstances above stated, I think that the case was pregnant with suspicion fully justifying the defendant in requiring proof in solemn form, and that there was evidence to justify, and good cause for, exonerating the defendant from costs.

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It is urged, however, that the present order cannot be sustained, because (1) there was a plea of undue influence; (2), because it gives costs out of the assets. It is, however, settled that such a plea, though no doubt a material element to be considered, does not affect the Judge's power to allow costs to the unsuccessful defendant. In this suit there were no extra costs occasioned by the plea, and the defendant was not guilty of blamable or unreasonable conduct in pleading such a defence.

With regard to the distinction between absolving from costs and allowing costs in testamentary litigation, no doubt the latter exercise of discretion requires stronger facts; but if the facts are such as to justify a special order of any kind, the form of that order is for the Judge's consideration. The distinction between the two orders is one of degree, not of jurisdiction and principles. The order is not punitive, like those in *Myers* v. *Financial News* (1) and *Williams* v. *Woods* (2). No authority has been cited to support plaintiff's argument; and, indeed, up to the present, there has been no instance of an appeal from a special order in a Probate suit—a species of litigation where any interference with the discretion of the Judge who heard the witnesses would be peculiarly difficult and dangerous. It may seem hard that, the assets being small, the plaintiff should, in result, practically lose all he got under the will. That was, however, a matter for the Judge's consideration, not for us. The same thing has happened in other reported cases. In *Wilson* v. *Bassil* (3) I would infer from the special form of order that the assets were also small. As there appears to be no question that the assets are sufficient to pay all costs, we need not consider whether a similar order should be made, nor were we asked to do so.

I need not go through the authorities, which are only of value so far as they lay down a principle or rule. In some of the cases where undue influence was pleaded, the defendant was only relieved from costs, *e.g.*: *Broadbent* v. *Hughes* (4); *Smith* v. *Smith* (5). In others he was given costs, *e.g.*: *Wilson* v. *Bassil* (3); *Browning* v. *Mostyn* (6) (a case tried by a jury); *Davies* v.

(1) 5 T. L. R. 42.
(2) 55 L. J., Q. B. 566.
(3) [1903] P. 239.
(4) 29 L. J. (N. S.) P. 134.
(5) L. R. 1 P. & D. 239.
(6) 66 L. J., P. 37.

Gregory (1); *Orton* v. *Smith* (2); *Brown* v. *Penn* (3). There are many authorities to the like effect. In cases tried on issues at the Assizes the Probate Court always acted on the Assize Judge's view as to costs: *Bramley* v. *Bramley* (4); *West* v. *Goodrick* (5). The discretion of the Judge was governed by the reasonableness of the litigation as a whole. Once the principle is established, the various examples or particular instances of discretion cannot control our decision. One Judge's judgment on facts cannot bind another Judge dealing with similar but not identical facts: *Simmons' Case* (6), *per* Lord Halsbury; *The Bass Trade Mark, No.* 2, *Case* (7), *per* Romer, L.J.; *Re Lamb* (8), *per* Bowen, L.J., cited in [1905] A. C., at p. 443. Where reasonableness is the test, no rigid formula limiting judicial discretion can be laid down beforehand. The view of Bowen, L.J., in *Forster* v. *Farquhar* (9) is peculiarly applicable to testamentary litigation. There is good cause for a special order whenever such order is fair and just. The rules as to allowing costs are part of the course and law of the Court, and it was never intended by the Judicature Act to alter the fundamental principles on which Probate jurisdiction was exercised, or to enable a plaintiff, by insisting on trial by a jury, to deprive the Court of its previous power of allowing costs where, on the evidence, it was proper to make such order. No doubt, where the case is tried by a jury, the Court must make a special order, but such order is conclusive unless there were no materials to justify it, or unless the Judge erred in principle. Just as a verdict cannot be questioned if there was evidence to support it, so the order of a Judge is not appealable if he had material before him to warrant his order. Indeed, such order stands on a higher level than a verdict, from the nature of the judicial office, and the express provisions of section 52. In the annals of the Probate Court, before and since the Judicature Act, no appeal from a costs order can be found. Testamentary cases, relating as they do to proof of a document affecting assets, differ widely from

(1) L. R. 3 P. & D. 28.
(2) *Ibid.* 23.
(3) 12 T. L. R. 46.
(4) 3 Sw. & T. 430.
(5) 31 L. J. (N. S.) P. 39.
(6) [1892] A. C. at p. 208.
(7) [1902] 2 Ch. at p. 581.
(8) 4 Morr. Bankcy. Cas., at p. 32.
(9) [1893] 1 Q. B. at p. 567.

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ordinary litigation where the award of costs against a nominally successful plaintiff is penal and is based on substantial failure of the action. In a Probate suit, costs are given out of a fund, and the determining consideration is whether on the entire case the defendant was reasonably justified in his contest. Accordingly, a plaintiff who fails in proving a will may get his costs: *Boughton* v. *Knight* (1), though in an ordinary action a successful defendant can never be ordered to pay costs: *Foster's Case* (2). The only question that we have jurisdiction to consider, as Bowen, L.J., said in a well-known case, is whether the conditions which give the discretion have arisen; if they have, we cannot interfere.

Solicitors for the plaintiff: *Magee & Lahiff.*
Solicitor for the defendant: *W. D. Sullivan.*

R. G. L. L.

K. B. Div. 1906. May 4, 10.

MUSGRAVE *v.* M'AVEY (3).

Estoppel by record—Estoppel in pais—*Civil-bill ejectment on title—Dismiss on ground of subsisting tenancy—Subsequent ejectment for non-payment of rent.*

A judgment in ejectment on the title under the Civil Bill Acts has no greater effect by way of estoppel than a judgment in such action in the Superior Courts.

The judgment to that effect of Palles, C.B., and Barton and Wright, JJ., in *Lennon* v. *Meegan* ([1905] 2 I. R. 189) followed.

A finding of fact upon which such judgment is based, and which is set out on its face, has no greater effect by way of estoppel than the judgment itself.

A civil-bill ejectment on the title was dismissed by the County Court Judge, and the dismiss was affirmed by the Judge of Assize on the ground, as set out on the face of the affirmance, that the defendant's tenancy in the holding was subsisting undetermined:—

Held, that, in a subsequent ejectment for non-payment of rent, between the same parties and for the recovery of the same lands, the defendant was not estopped by the affirmance from denying the existence of such tenancy.

(1) L. R. 3 P. & D. 64. (2) 3 Q. B. D. 515.

(3) Before LORD O'BRIEN, L.C.J., PALLES, C.B., and ANDREWS and KENNY, JJ.

Quære: Whether, if it had appeared that in the ejectment on the title the defendant had deposed to matters which, if true, would have established the existence of a tenancy between himself and the plaintiff, and so obtained a dismiss on this ground, he would have been estopped by his conduct from denying, in the subsequent ejectment for non-payment of rent, the existence of such tenancy.

CASE STATED by Andrews, J., on the hearing of an appeal from a decree for possession in a civil-bill ejectment for non-payment of rent.

The following are the material facts as set out in the case:—

On the 25th June, 1890, the plaintiffs' predecessors in title, Messrs. John R. Musgrave and James Musgrave, the then landlords of the defendant, obtained a decree in ejectment for non-payment of rent against the defendant for the recovery of the lands in question, the amount of rent then due being £70. The several steps prescribed by sect. 7, sub-sect. (1), of the Land Law (Ireland) Act, 1887, were duly taken, and a warrant for possession obtained from two Justices, which was duly executed on the 12th October, 1891, and possession given to the Messrs. Musgrave, with whom the defendant then signed an agreement to occupy as caretaker.

The defendant entered into occupation as such caretaker, and was still in such occupation on the 16th March, 1895, when he paid to the then agent of the landlords £12 in cash, and deposited with him two promissory notes for £15 11*s.* 1*d.* The agent gave him a receipt for the £12 as "on account of a debt due Messrs. John R. and James Musgrave," and entered the payment in the rental of the estate with a note "paid on account of a debt due to Messrs. Musgrave." The defendant continued in occupation without making any further payments.

In January, 1905, the plaintiffs in the present case brought a civil-bill ejectment on the title against the defendant, which was dismissed by the County Court Judge, and the dismiss was affirmed by the Lord Chief Baron at the Spring Assizes of 1905.

The plaintiffs subsequently brought another ejectment on the title against the defendant, which was also dismissed by the County Court Judge, and this dismiss was affirmed by Gibson, J., on appeal at the Summer Assizes, 1905. The affirmance, after reciting the dismiss, was in the following terms:—"And whereas

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the plaintiffs appealed from the said dismiss to this present Assize, and the said appeal this day came on to be heard in the presence of solicitor and counsel for plaintiffs and solicitor for defendant, who was not present or examined, and it appearing to the Court that the said defendant paid a sum of £12 on account of rent due to the plaintiffs for the lands aforesaid on March 16th, 1895, for which a receipt was passed by plaintiffs' agent, and which was duly entered in the rent account as received by the said agent, Mr. Swiney, since deceased, the Court not expressing any opinion as to whether if no rent was paid the plaintiffs' title would have been extinguished, It is ordered and decreed by the Court that the said dismiss be and the same is hereby affirmed, the defendant's tenancy in the holding subsisting undetermined."

The plaintiffs afterwards brought the present civil-bill ejectment for non-payment of rent, and obtained a decree for possession from the County Court Judge. From this decree an appeal was taken, which came before Andrews, J., at the Spring Assizes of 1906.

On the hearing of this appeal, the plaintiffs' solicitor gave evidence that on the hearing of the first ejectment on the title the defendant swore he made the payment of £12 on account of rent. The present agent of the plaintiffs produced the rental of the estate, and proved the entry of the payment of £12 in the rental to be in the handwriting of the late agent. The defendant was not examined, nor was any witness examined on his behalf.

No further evidence was given in relation to the two promissory notes deposited by the defendant.

The 15th paragraph of the case set out that Andrews, J., found as a fact, upon the evidence, that the sum of £12 paid by the defendant on the 16th March, 1895, was paid and received on account of the debt consisting of the arrears of rent ascertained to be due by the decree of 25th June, 1890.

The present case was stated on the application of the defendant's solicitor, the questions for the opinion of the Court being as follows:—

"1. Is the defendant precluded by the decree of Mr. Justice Gibson of the 15th July, 1905, from denying that a new tenancy was created, or that his old tenancy was revived or reinstated, by the payment of the said sum of £12?

"2. Having regard to that decree, is it competent, to a Judge hearing the civil-bill appeal in the present case, to hold and determine, on the facts stated, that at the commencement of the civil-bill action in the present case no tenancy in the holding in question was subsisting and undetermined in the defendant?

"3. If question 1 be answered in the negative, and question 2 be answered in the affirmative, did the [mere (1)] payment of the £12, and the deposit of the promissory notes, as hereinbefore mentioned, or did either of them, create a new tenancy in the defendant, or revive or reinstate his former tenancy, having regard to the finding of fact stated in the 15th paragraph of the case?

"4. Having regard to the said finding of fact (if this question be an open one for determination), was there, on the facts stated, a subsisting tenancy in the holding in question in the defendant at the commencement of the civil-bill action in the present case?"

H. Morgan Byrne (with him *Henry, K.C.*), for the plaintiffs:—

The affirmance of the 15th July, 1905, by Gibson, J., of the dismiss in the second ejectment on the title, on the ground, as set out on the face of the affirmance, that there was a tenancy subsisting, operates as an estoppel by record, and the defendant is concluded from now denying the existence of such tenancy: Cababe on Estoppel, p. 2; *Flitters* v. *Allfrey* (2). *Lennon* v. *Meegan* (3) is distinguishable; there the grounds of the dismiss did not appear on its face. The same observation applies to *Irish Land Commission* v. *Ryan* (4).

[He also referred to *M'Sheffry* v. *Doherty* (5), *Govern* v. *Roland* (6), *Doyle* v. *Keenan* (7).]

Even if there is not an estoppel by record, there is an estoppel by conduct. In the ejectments on the title in 1905, the defendant having made the case that there was a subsisting tenancy, and

(1) On the hearing in the King's Bench Division the 3rd question was amended by Andrews, J., by inserting the word "mere" before the word "payment."

(2) L. R. 10 C. P. 29.

(3) [1905] 2 I. R. 189.

(4) [1900] 2 I. R. 565.

(5) [1897] 2 I. R. 191, 210.

(6) 7 Ir. C. L. R. 619.

(7) 9 L. R. Ir. 168.

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having obtained dismisses on that ground, cannot now dispute the existence of such tenancy.

P. S. Walsh, for the defendant:—

A dismiss in a civil-bill ejectment on the title does not act as an estoppel: *Lennon* v. *Meegan* (1); *Lessee of Black* v. *Davis* (2); *Coneys* v. *Coneys* (3). Where the dismiss itself does not operate as an estoppel, the reasons given for it cannot so operate.

There is no estoppel by conduct. There is nothing in the case to show that, in the ejectments on the title, the defendant set up the defence of a subsisting tenancy.

Henry, K.C., in reply.

Cur. adv. vult.

May 10.

LORD O'BRIEN, L.C.J.:—

This case has been succinctly stated by Andrews, J., in the following terms. [His Lordship read the case.]

The first question put to us is this, "Is the defendant precluded by the decree of Mr. Justice Gibson of the 15th July, 1905, from denying that a new tenancy was created, or that his old tenancy was revived or reinstated, by the payment of the said sum of £12?" That is to say, does the decree of Mr. Justice Gibson, which sets out on its face that the tenancy in the holding was then subsisting and undetermined, and dismisses the ejectment on the title on this ground, estop the defendant from now denying the existence of such tenancy? In my opinion the question is concluded by the decision of Palles, C.B., and Barton and Wright, JJ., in *Lennon* v. *Meegan* (1). In that case (a case stated by Holmes, L.J., as Judge of Assize) the plaintiff had brought a civil-bill ejectment on the title, which had been dismissed, the dismiss purporting on its face to be on the merits, and it was held that such dismiss did not estop the plaintiff from bringing a subsequent civil-bill ejectment on the title for the recovery of the same lands against the same defendant, although there had been no change of title in the meantime. My Lord Chief Baron held that the question reserved, viz.: whether the dismiss was a conclusive answer

(1) [1905] 2 I. R. 189. (2) Batty, 80. (3) 8 Ir. C. L. R. 379.

to the subsequent ejectment, ought to be answered in the negative on two grounds, the first being that the ground of the dismiss, that the plaintiff had failed to prove his case, did not involve that the plaintiff had not a good title against the defendant, or anything more than that he had not shown it at the trial. But he stated that he desired to rest his judgment on a broader ground. He then goes exhaustively into the cases; traces the history of ejectment proceedings; examines the nature of the action of ejectment, not alone in the Superior Courts but in the Civil Bill Court, and arrives at the conclusion that a judgment in ejectment in the Civil Bill Court has no greater effect by way of estoppel than a judgment in ejectment in the Superior Courts had at Common Law, which judgment worked no estoppel, save in the one exceptional case of a subsequent action for mesne rates brought by a plaintiff who had recovered judgment in ejectment. Barton and Wright, JJ., concurred in this view. That decision, I think, governs the present case.

It is suggested that this case is distinguishable, because here the ground of the decision is given. It appears on the face of the dismiss. But it would be a strange anomaly that although a judgment in ejectment itself does not constitute an estoppel, the reason assigned for it does.

I am of opinion that the first question should be answered in the negative.

This being so, Andrews, J., has found that the sum of £12 was paid on account of the former debt, consisting of arrears of rent ascertained to be due by the decree of 25th June, 1890. This is an ejectment for non-payment of rent, and if this sum was paid on foot of the old debt, and there was no estoppel, it would appear to me that this ejectment for non-payment of rent should be dismissed on the ground that there was no tenancy.

It is said, however, that there is an estoppel *in pais*. This point is not open upon the case, but perhaps I might say a word as to it. My present impression is that if a party to an action states something as a fact which does not exist, and induces the Court to act on such statement, there would be an estoppel by conduct. I do not think, however, that this principle applies to the present case. Here the solicitor only pointed out what was true,

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that there was this entry in the rental. There was no falsehood in that. He may have suggested an argument upon it, but I do not think that that would constitute an estoppel.

We shall answer the first question in the negative; the second in the affirmative; the third and fourth in the negative.

PALLES, C.B.:—

The basis of my conclusion is that the effect of a judgment in ejectment on the title under the Civil Bill Acts is that, and that only, which a judgment in such an action in one of the Superior Courts had at Common Law before our Procedure Act, 1853 (16 & 17 Vict. c. 113), which it continued to have after the Act of 1856 (19 & 20 Vict. c. 102), and which a judgment in such an action in the High Court now has.

My reasons for arriving at this conclusion are stated in much detail in *Lennon* v. *Meegan* (1), and need not be here repeated.

The ejectment in that case was, as is that in the present, one on the title. In that case the ground upon which the ejectment was decided was not stated upon the face of the record, and, for that reason alone, we were coerced by the decision in *The Irish Land Commission* v. *Ryan* (2) in the Court of Appeal, to decide that there was no estoppel. I, however, was not content to rest my decision on a question of such far-reaching importance, and so likely to recur, on that technical point, and, therefore, I considered the whole question of estoppel arising out of proceedings in ejectment in the Civil Bill Court, and arrived at the conclusion that the effect of a judgment in ejectment in such Court was identical with the effect which a judgment in ejectment in the Superior Courts had at Common Law. Although the same conclusion was arrived at by my brothers Barton and Wright, JJ., it may be doubtful whether that reasoning amounts to an actual decision, having regard to the other point on which the case might have been decided, and upon which my brother Andrews, J., based his judgment. I am glad, therefore, that we have a case before us in which we are able to make this, as I do, *the sole ratio decidendi*, and thus settle the question once and for ever, so far as it concerns this Court.

(1) [1905] 2 I. R. 189. (2) [1900] 2 I. R. 565.

I deal then only with the argument that this case can be distinguished from *Lennon* v. *Meegan* (1). It is sought to distinguish it because it is said that there are three facts in the present case each of which is sufficient to work an estoppel, although the mere judgment would not have that effect.

These facts are—(1) The finding upon which the judgment is based, viz.: that of the existence of a tenancy. (2) The fact that the defendant swore before the County Court Judge, at the hearing of one of the previous ejectments, that the payment stated in the case was made on account of rent. (3) Because it is alleged that the defendant must be taken to have represented to Gibson, J., that there was a subsisting tenancy, or to have relied before him upon the payment of the £12 being evidence of the existence of such a tenancy. Each of these arguments is easily answered.

As to the first, it would be in the last degree illogical to hold that when the nature of the suit is such that the final and conclusive judgment in it is not an estoppel as to the matter of fact which is its necessary basis, and which, therefore, is an *implied* determination of it; yet that its *express* determination of a fact ancillary to, and being the basis of, the judgment, is to have that effect.

The estoppel in an action *inter partes* is worked, not by the verdict (which is the nearest equivalent to the finding here of Gibson, J.), but by the judgment, and in most cases, as in this, the judgment follows as a conclusion in law from the facts determined, so that if the latter amounted to an estoppel, although the judgment did not, the proceedings in an ejectment antecedent to the judgment would have an effect which the law says the judgment itself shall not have. This conclusion is contradictory to the settled law, and there is no shadow of authority to support it.

As to the defendant's statement that the sum was paid for rent, that statement was undoubtedly true; but he did not say that it was paid for rent which had accrued due since the former judgment in ejectment; and unless it was for such rent, it could not be alleged that it created a new tenancy.

As to the third contention, Mr. Justice Gibson's affirmance does

(1) [1905] 2 I. R. 189.

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not state that the defendant's solicitor relied on the alleged existing tenancy, either as a defence to the ejectment upon the title, or at all. It appears from the recitals in the affirmance that the defendant's solicitor relied upon the Statute of Limitations as having extinguished the plaintiffs' estate, and the statute would have had that effect had the character of the defendant's possession been changed from that of caretaker into trespasser upwards of twelve years before suit, and had there been no subsequent acknowledgment of the plaintiffs' title by payment of rent or otherwise. It is quite consistent with the affirmance that this was the only defence relied on, and that the learned Judge held that defence to be unavailable because he was of opinion that there had been a payment of rent which accrued due after the recovery in ejectment.

Upon the whole, I am clearly of opinion that there is no estoppel whatsoever on the defendant, either by record, act *in pais*, or otherwise, and that the answers should be, to the first question in the negative, to the second in the affirmative, and to the third and fourth in the negative.

ANDREWS, J., concurred.

KENNY, J.:—

In my opinion there is no estoppel, either by matter of record or by conduct, in this case—and the first question put to us should be answered in the negative, and the second in the affirmative. An action of ejectment stands in a different position from that of actions *in personam*, so far as the doctrine of estoppel is concerned. What the defendant is sought to be bound by in this case is, not the actual dismiss of Gibson, J., of the 15th July, 1905, but the statement on the face of it of the existence, undetermined, of a tenancy in the defendant. I cannot acquiesce in the proposition that while the dismiss itself does not work an estoppel, this finding of the Judge can do so. The dismissal of an action of ejectment does not—as indeed the several proceedings for recovery of the possession of the lands in question show—preclude the plaintiff from commencing as many fresh actions as he likes of an identical nature for recovery of the same lands and against the same defendant. All that is determined by the

dismiss is, that the plaintiff has failed to prove his right to recover the possession at that particular trial. Possibly he may be able to do so in a subsequent proceeding. On the other hand, if the order on his process was one for possession of the lands, there would be nothing to preclude the defendant, if he thought he had material for re-agitating the case, from commencing, after the execution of the order for possession, another action to regain the lands. These principles are very clearly enunciated in the judgments in the recent case of *Lennon* v. *Meegan* (1).

With reference to the alleged estoppel by conduct, I regret that I cannot accede to Mr. Henry's argument. It appears that at the hearing before Gibson, J., the defendant was not present. He was represented by a solicitor, and whatever proofs were made came from the plaintiff. It was on these proofs the learned judge came to his decision. What was the precise nature of the contention put forward on the defendant's behalf by his solicitor, we do not know. It may have been founded on the Statute of Limitations, or he may have advanced the suggestion that the payment of the £12, in the manner alleged, showed the existence of a tenancy. I dare say he was not very particular as to the precise ground on which he staked his case, so long as he could successfully combat the plaintiffs' right to a decree. In my opinion, this action of his advocate does not approach a state of things that could be relied on as the adoption of a line of conduct which the defendant should not be allowed to repudiate. Neither can I think there is any evidence that by reason of the defendant's action—by himself or his advocate—the plaintiffs' position has been altered. If the defendant had been examined as a witness in support of the allegation of tenancy, and had deposed to circumstances which would—if true—have incontestably established the revival of an old, or the creation of a new, tenancy —the position might have been different. But no evidence of this character is shown to have been given, and there is no need for me to express an opinion on such a hypothetical case.

As to the third question, I am of opinion we should answer it in the negative, but on the assumption that it is to be treated as

(1) [1905] 2 I. R. 189.

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if the word "mere" were inserted before the words "payment of the £12." The fourth question should also, I consider, be answered in the negative, as such conclusion follows necessarily from the reply we give to the third question.

Solicitor for the plaintiffs: *John Mallins.*
Solicitor for the defendant: *Patrick Gallagher.*

J. G. T.

Appeal. 1906. June 5.

HENDERSON *v.* M'TEAR (1).

Practice—Costs—Taxation—Separate causes of action—Apportionment—Expenses of witnesses—Less than £50 recovered—Third counsel—Instructions and perusals—Gen. Ord. LXV., R. 65 (41), (42).

In an action brought to recover £414 15*s.* 6*d.*, for work and labour done under three separate contracts, all of which related to the execution of the same undertaking, the defendant pleaded that he had contracted as agent for a disclosed principal; that the work had not been executed in a proper manner; and that the plaintiff agreed to execute each of the three contracts for a bulk sum, in the total less than the amount sued for.

The jury found that the defendant had contracted personally in the first contract, but had contracted as agent for a disclosed principal in the second and third contracts. They also found, by one and the same finding, that the work done under all three contracts had been executed in a proper and workmanlike manner, and found against the defendant on the issues as to the price of the works. Judgment was entered for the plaintiffs for £37 18*s.* 8*d.*, with costs upon the first contract, and judgment was entered for the defendant with costs upon the second and third contracts:—

Held, on taxation of the costs of the action, reversing the decision of the King's Bench Division, that the plaintiffs should be allowed only such proportion of their costs as related to the cause of action upon which they had succeeded, and that they should not be allowed, in addition, the costs of issues found in their favour by the jury in respect of those causes of action on which judgment with costs had been entered for the defendant.

Held, further, that plaintiffs having recovered less than £50, G. O. LXV., R. 65 (41), applied, and that plaintiffs were not entitled to the costs of a third counsel, notwithstanding the fact that the jury had found in their favour certain

(1) Before SIR SAMUEL WALKER, C., and FITZ GIBBON and HOLMES, L.JJ.

issues relating to the causes of action on which judgment had been entered for the defendant; but that the defendant was entitled to the costs of a third counsel, inasmuch as the sum sued for exceeded £50.

G. O. LXV., R. 65 (42), only applied to a plaintiff's costs.

THE action was brought to recover a sum of £414 15*s.* 6*d.* for work and labour, materials supplied, and services rendered. In the statement of claim, the plaintiffs averred that in June, 1902, the defendant contracted with the plaintiffs for the execution by the plaintiffs of certain artesian boring works at Whitehouse, in the county of Antrim, to the depth of 100 feet, at the rate of 7*s.* 2½*d.* per foot. These boring works were executed by the plaintiffs for the defendant to the depth of 100 feet.

In July, 1902, the defendant contracted with the plaintiffs for the execution by the plaintiffs of boring works to an extended depth of 60 feet, at the rate of 9*s.* per foot for the first 25 feet, 10*s.* 9½*d.* for the next 25 feet, and 12*s.* 7*d.* per foot for the last 10 feet.

In August, 1902, the defendant agreed with the plaintiffs for the execution of further boring works to an extended depth of 40 feet, at the rate of 12*s.* 7*d.* per foot for the first 15 feet, and 14*s.* 4½*d.* per foot for the last 25 feet. These boring works were executed by the plaintiffs for the defendant to the *extra* depths.

The defendant pleaded, among other defences, that the contracts were entered into by him as agent for one E. S. Smith, as the plaintiffs well knew at the time of entering into the contracts. He also pleaded that it was agreed that the price for the execution of the boring works to the depth of 100 feet should not exceed £33, and that it was agreed that in case the defendant desired to have the boring and other works carried on beyond 100 to depth of 200, or any lesser depth, that the costs of the second 100 should not exceed £67 in any event, and that for any boring or other works done from said 100 feet to 200 feet, the price charged should be proportionate to the depth to which such boring and other works were carried. He also pleaded that the work was so badly done as to be useless, and also that the plant used was so bad, and the workmen employed so bad, that the work took longer time to execute than it should have done.

The action was tried before Kenny, J., and a special jury on

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the 24th, 25th, and 26th March, 1904, when, in answer to questions submitted to them by the Judge, the jury found that when the contract of the 16th June, 1902, was entered into, the plaintiffs were not aware that the defendant was only an agent, that the defendant did not then disclose the name of his principal, and that the plaintiffs then contracted with the defendant as principal; but that at the time of the two contracts of July and August, 1902, the plaintiffs were then aware that the defendant was only an agent, that the defendant had then disclosed the name of his principal, and that the plaintiffs contracted with him as agent. The jury found that it was not agreed that the expense of the boring works to the extent of 100 feet was not to exceed £33, nor was it agreed that the expense of the boring works beyond 100 feet and up to 200 was not to exceed £67. They further found that the work had been done in a proper and workmanlike manner, and that the order for the boring was given on the basis of the price being based on the plaintiffs' price list.

The Judge left both parties to move for judgment. The defendant moved that judgment be entered for him, or for a new trial. The Court on the 28th June, 1904, after argument, ordered that judgment be entered for the plaintiffs for the sum of £37 18*s.* 9*d.* with costs upon foot of such of the causes of action in the statement of claim as were founded on the contract of the 16th June, 1902, and that judgment be entered for the defendant with costs upon the residue of the said causes of action, viz. those in respect of the contracts of the 7th July and 7th August, 1902, and that the parties abide their respective costs of these motions and arguments thereon.

On the plaintiffs' bill of costs coming on for taxation, the Taxing Master disallowed a large number of items, including witnesses' expenses and the costs of a third counsel, and allowed only a proportion of the general items in the plaintiffs' bill of costs which the Taxing Master considered reasonable and applicable to the cause of action on which the plaintiffs had succeeded.

The plaintiffs objected to this ruling; they also objected to the taxation of the defendant's costs on the ground that several items were allowed to the defendant which ought to have been disallowed. The plaintiffs contended that the defendant was

entitled to be allowed only such costs as were properly incurred by him in connexion with the issues tried in the action and found in his favour, which were solely relative to the causes of action in respect of the contracts of the 7th July and 7th August, 1902. The plaintiffs also objected to the defendant being allowed any costs with respect to any issue relating to the first contract where that issue was found against him.

The plaintiffs also objected to the costs of a third counsel being allowed to the defendant, when a third counsel was not allowed to the plaintiffs. The Taxing Master overruled the objections, and in his report—after referring to the pleadings and judgments—he stated :—

> "As to the objections to the several items set forth in the schedule to the objections, I certify that I taxed and allowed same on the principle laid down in the case of *Kennedy* v. *Healy* ([1897] 2 I. R. 258), as I interpret it: and it seemed to me that this case was governed by it.
>
> "This action was brought to recover the sum of £414 15*s.* 6*d.*, but the plaintiff recovered £37 18*s.* 8*d.* only. I therefore formed the opinion that Ord. LXV., R. 65 (41) and (42), became applicable to the taxation of the plaintiffs' costs, and I allowed them the expenses of two counsel only, and I disallowed them the costs of instructions (except the instructions to institute proceedings) and of perusals. On this subject I beg leave to refer to my certificate of this date on the objection of the plaintiffs to the allowance in the defendant's costs, and to observe that Ord. LXV., R. 65 (41), is not applicable to the defendant's case, inasmuch as the amount sued for exceeds £50, and that Order LXV., R. 65 (42), only affects a plaintiff's case.
>
> "As to all the fees or allowances which are discretionary, I have taken into consideration the several matters mentioned in Ord. LXV., R. 65 (37), which are relevant hereto, including the allowances for witnesses' expenses."

There was a further report of the Master on the plaintiffs' objections to the defendant's costs, dated the 25th January, 1906, in which he stated :—

> "As to the objections to the several items set forth in Part A (1) of the Schedule to the objections, I certify that I have taxed and allowed same on the principle laid down in the case of *Kennedy* v. *Healy* ([1897]

(1) Part A of the Schedule comprised the costs in the nature of the general costs of action.

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2 I. R. 258), as I interpret it: and it seemed to me that this case was governed by it.

"As to the objections to the several items set forth in Part B (1) of the Schedule to the objections, I certify that the provisions of Ord. LXV., R. 65 (41), precluded me from allowing to the plaintiffs the costs of more than two counsel; but I submit that, in the exercise of my discretion, I was at liberty to allow the defendant the costs of three counsel, and accordingly I exercised such discretion in his favour. Perhaps I may add that, if empowered, I would have also allowed the plaintiffs the costs of three counsel.

"As to the objections to the several items set forth in Part C (1) of the Schedule to the objections, the reasons I have given in paragraph 4 are applicable thereto" [*i.e.* the Taxing Master had taxed them on the principle of *Kennedy* v. *Healy*]. "I allowed these items according to the best exercise of my judgment and discretion."

The plaintiffs applied to the King's Bench for an order that the objections of the plaintiffs to the taxation of their costs, and also their objections to the allowances on taxation of the defendant's costs might be allowed, and that it be referred back to the Taxing Officer to vary his certificate accordingly.

On the 24th April, 1906, the King's Bench Division gave judgment by which it was ordered that the bills of costs of the plaintiffs and the defendant be referred back to the Taxing Master for re-taxation and review, and that upon such re-taxation the Taxing Master proceed to tax and ascertain as payable to the plaintiffs not only the costs of the cause of action on the first contract upon which they have recovered judgment for £37 18*s.* 9*d.*, but also all costs in relation to the issue as to the negligent and defective execution of the works in the second and third contracts; and further, in determining, in the exercise of his discretion, whether a third counsel should or should not be allowed to the plaintiffs at the trial, the said Taxing Master should treat, as the matter in issue between the plaintiffs and the defendant upon which the plaintiffs have succeeded, not only the cause of action upon the first contract, but also the questions as to the defective character of the execution of the work included in the second and third contracts; and it was

(1) Part B related to the costs of a third counsel; and Part C related to issues involving the subject-matter of all three contracts, and on which plaintiffs succeeded.

further ordered that in taxing and ascertaining the costs payable to the defendant the said Taxing Master should disallow any costs incurred by him in relation to the issue raised by the paragraph of the defence which pleaded negligent and defective execution of the works.

From that order the defendant appealed.

Harrison, K.C., and *D. M. Wilson*, for the appellant:—

The defendant got judgment on contracts 2 and 3; the plaintiffs got judgment on contract 1. That enabled them to recover £37, which did not entitle them to three counsel: Ord. LXV., R. 65 (41). The costs follow the event: Ord. LXV., R. 1; and "event" means the result of the entire litigation: *Myers* v. *Defries* (1); *Kennedy* v. *Kelly* (2); *Fisher* v. *Rooney* (3). This was a case of three separate and independent causes of action, and the Taxing Master had a discretion to apportion the expenses. The plaintiffs are entitled to get so much of the costs as are referable to the causes of action on which they succeeded: but they are not entitled to any costs against the defendant on contracts 2 and 3.

S. L. Brown, K.C., and *J. H. Pigot*, for the plaintiffs:—

Where distinct issues are raised the word "event" must be read distributively. This case turns on the facts. Of the sixteen witnesses for the defendant, one witness, in addition to the defendant, was examined as to the question who was the principal; and the others were all witnesses on the question as to the quality of the work. The Taxing Master held that *Kennedy* v. *Healy* (2) applied, and he gave the plaintiffs half the costs of their two witnesses who were examined as to the quality of the work, and he gave the defendant half the costs of the sixteen witnesses on the issues on which the defendant failed.

As to the first issue, we submit that we are entitled to the entire costs of the witnesses who were examined as to the quality of the work. The defendant is not entitled to any costs of witnesses on an issue on which he absolutely failed. We are entitled to a direction to the Taxing Master to tax the costs of the plaintiffs' witnesses, whose evidence was referable to contract 1, whether or

(1) 5 Ex. D. 180. (2) [1897] 2 I. R. 258. (3) 36 I. L. T. R. 38.

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not they also related to the second and third contracts, and also to a direction to the Taxing Master to disallow all witnesses' expenses on contracts 2 and 3.

SIR SAMUEL WALKER, C. :—

We have heard this appeal at considerable length, and we have come to the conclusion that the order of the King's Bench Division must be discharged; that the objections must be disallowed, and that the taxation should stand as it is. The principal portion of the objections arises from the order that has been made by the King's Bench Division. There were three distinct contracts, three causes of action absolutely distinct, in point of law, and in point of fact. The first contract was dated the 16th June, 1902, to bore down 100 feet; the second was dated the 7th of July, 1902, to bore down a further 60 feet; and the third, the 7th August, 1902, to bore a further 40 feet. These are all separate causes of action. There may have been, and probably were, witnesses applicable to each, but in the main these witnesses were probably applicable to all. The case came before the King's Bench Division to impeach the way in which the trial was conducted. On the 28th June, the King's Bench made a clear and positive order that judgment should be entered for the plaintiffs for the sum of £37 18*s.* 9*d.* with costs upon foot of such of the causes of action in the statement of claim as are founded upon the contract of the 16th June, 1902, and that judgment be entered for the defendant with costs upon the residue of said causes of action, viz., those in respect of the contracts of the 7th July and the 7th August, 1902, and that the parties should abide their own costs of three motions and arguments thereon.

That judgment was distinct and clear. It gives the plaintiffs judgment with costs in respect of one cause of action, and the defendant judgment with costs in respect of the other two. They were three distinct causes of action, and were so dealt with by the judgment.

The Taxing Master proceeded to deal with it, and I cannot find any fault with the principle on which he dealt with it. It is said that he has divided into two the costs of the witnesses, and further that he has not proceeded on a right basis. I cannot find

that borne out, either in principle or figures. He has apportioned, according to his judgment, the costs of the witnesses—No. 1, in respect of the plaintiffs' costs, and Nos. 2 and 3 in respect of defendant's costs, which the defendant is entitled to get. I see nothing in principle to enable us to quarrel with the judgment of the Taxing Master.

We now come to the order of the King's Bench Division, which has not been very strongly supported by Mr. Brown or Mr. Pigot. That order is—"That the respective bills of costs of the plaintiffs and of the defendant be referred back to the Taxing Master for re-taxation and review, and that upon such re-taxation the said Taxing Master do proceed to tax and ascertain as payable to the plaintiffs not only the costs of the cause of action on the first contract, upon which they have recovered judgment for £37 18*s.* 9*d.*, but also all costs in relation to the issue raised by the 5th paragraph of the defence, to so much of the action on the second and third contracts as relates to the defective character of the work."

That appears to me a principle which cannot be supported. There were three causes of action here, and it is plain that the plaintiffs were bound to be non-suited on the second and third causes of action. Suppose that the plaintiffs' second cause of action was libel, and the third, assault, and that the second cause of action involved not only publication but privilege and justification, and that the third cause of action involved questions of assault, and *son assault demesne*, could it be contended that the plaintiffs are entitled to get costs in relation to the first cause of action, and that they were entitled to add to that the costs on the other two causes of action in which they had not succeeded? That appears to me to be wholly impossible, and also quite at variance with the judgment of the King's Bench Division, which gives the costs to the defendant on the judgment as to the residue.

As to the question with regard to the third counsel, the Rule is express on the point. But the way in which the order deals with that is—"In determining, in the exercise of his discretion, whether a third counsel should or should not be allowed to the plaintiffs at the trial, the said Taxing Master shall treat as the matter in issue between the plaintiffs and the defendant, upon which the plaintiffs

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have succeeded, not only the cause of action upon the first contract, but also the questions as to the defective character of the execution of the work included in the second and third contracts."

In other words, it appears to establish that in the inverse ratio to the merits a third counsel may be allowed, because the plaintiffs had chosen to join causes of action on which they had not succeeded to one on which they had succeeded. Mr. Brown said that he did not consider it a strong part of his case in the Court below, and therefore did not support it here.

These are the two main points; the third point is, that the Taxing Master should disallow any costs incurred by the defendant in relation to the issue raised by the 5th paragraph of the defence. We think that, having regard to the judgment of the King's Bench of the 28th June, this ought not to be in the order, and that therefore the whole order must be discharged, the objections must be disallowed, and the taxation stand.

FITZ GIBBON, L.J. :—

I concur in the result with the Lord Chancellor.

I do not understand how the Taxing Master, not having the defendant's costs before him, can have acted otherwise than by analogy, in dealing with the plaintiffs' objections "on the principle of *Kennedy* v. *Healy* (1)." As I understand that principle, it is this—Where there are, in one writ, two independent causes of action, on one of which the plaintiff, and on the other the defendant, succeeds, "action" must be construed distributively; and as the costs of the action are to follow the event, neither plaintiff nor defendant is entitled to "*the general costs of the action*"; but *each party* is entitled to have his costs of the independent cause of action upon which he has succeeded taxed upon the same principle; and any items common to both—such as the expenses of witnesses, who gave evidence upon both causes of action—and what would otherwise have been taxed as "general costs of the action," must be apportioned between the plaintiff and the defendant. In other words, in the double action, each party gets the costs of the action in which he succeeds, and the smaller set of costs is to be set off, *pro tanto*, against the larger.

(1) [1897] 2 I. R. 258.

Mr. Brown aad Mr. Pigot both disclaimed the applicability of that principle here; it would not give either of them what he wanted. On the contrary they contended that, because the plaintiff had established a cause of action for £30 odd, and in sustaining it had incurred, *inter alia*, the expense of a number of witnesses, he was entitled to charge the whole of that expense against the defendant, as part of the general costs of the action, and to make the defendant pay the amount in full, notwithstanding that those witnesses had been utilised, and those expenses had been incurred, in unsuccessfully endeavouring to establish further and distinct causes of action for £400.

When such a compound action is brought, and the plaintiff succeeds only in part, I hold that he can recover only such costs and expenses as the Taxing Master may hold to have been properly and necessarily incurred in establishing that part of the composite cause of action on which he has succeeded. There is no single witness here for whom nothing has been allowed, and, on the other hand, there is no single witness for whom the full amount claimed has been allowed. Therefore, in every case, there has been an apportionment of some sort; and this is right if the expense was, in each case, partly incurred on the cause of action for £30, and partly on the other alleged causes of action for £400 which failed. The items have been divided in different proportions. No principle of apportionment appears on the face of the bill itself; but the Taxing Master says that he acted in the exercise of his discretion, applying what he calls "the principle of *Kennedy* v. *Healy* (1)," which must mean that he apportioned such items as he held to be common to the several causes of action. Being satisfied that he was justified in apportioning, we have no right to alter his figures, nor have we any reason to suppose that they are wrong.

One of the questions mainly argued here—namely, whether the causes of action were severable—was also argued in *Fisher* v. *The Nation Newspaper Co.* (2). The King's Bench held the three causes of action here to be so distinct that judgment for the plaintiffs was given on one of them, and for the defendant on the

(1) [1897] 2 I. R. 258. (2) 36 I. L. T. R. 38.

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other two. It is impossible to say that, to make causes of action *distinct* they must be dissimilar, or must relate to things so different as, for example, tort and contract, or breach of promise and assault, or goods sold and delivered and slander. Distinct causes of action may arise even on one document, or with respect to the same class of work, or the same class of goods. The facts of each particular case must determine whether the causes of action are one or more. In *Fisher's Case* (1) the action was brought for substantially the same defamatory statement; but it appeared in each of two documents—a newspaper and a "manifesto." There was a verdict for the plaintiff upon one publication, and for the defendant upon the other, and much expense was incurred also upon innuendoes, on which the jury found for the defendant. I cannot see that the causes of action or findings of the jury in that case were less distinct than those upon the three contracts in the present case. The party succeeding on each cause of action being entitled to get his costs with respect to the part of the case on which he has succeeded, it comes to a mere question of apportionment, and we cannot say that the Taxing Master, in striking off a portion of the plaintiffs' costs, acted upon any wrong principle; therefore the objections cannot be sustained.

As to the third counsel, I cannot agree with the opinion of the King's Bench that, in exercising his discretion on the question whether the costs of three counsel should be allowed to the plaintiffs, the Taxing Master was bound to consider not merely the cause of action upon which the plaintiffs succeeded, and *for which alone* they could get any costs, but also the character or importance of two other causes of action on which judgment was given for the defendant. This question must arise, if at all, when the costs payable by the plaintiffs to the defendant, in respect of those *other* causes of action, come to be taxed.

HOLMES, L.J.:—

The order which is appealed from in this case may be divided into two parts. The effect of the first part would be, or might

(1) 36 I. L. T. R. 38.

be, to increase the costs allowed to the plaintiff; the effect of the second part might be to reduce the amount of costs payable to the defendant. I have come to the conclusion that neither part of the order can be supported. So far as the first part is concerned, the principle which seems to have been acted upon by the King's Bench Division in this case was to give to the plaintiff certain portions of the costs of the two causes of action upon which he entirely failed. I cannot find any authority for that, either on principle, or in the decision of any Court or Judge. It would seem to me that when a man fails in a cause of action, and judgment is given against him, he is not entitled to get any costs against his adversary; and, therefore, when I find an order giving him costs against his adversary in such a case, in my opinion that order cannot stand. I do not add anything to what has been said with respect to the third counsel. You cannot take into account in allowing a third counsel the causes of action upon which the party claiming the third counsel has entirely failed.

I have had more difficulty with regard to the second portion of this case, but I am disposed to concur with the other members of the Court.

Solicitors for the plaintiffs: *D. & T. Fitzgerald.*
Solicitor for the defendant: *Randall Howe.*

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Oct. 29.
Nov. 6.

In re W. P. DOYLE, a Bankrupt (1).

Bankruptcy—After-acquired property—Intervention of the assignees—Son of evicted tenant—Farm purchased for, by Estates Commissioners—Irish Land Act, 1903, *ss.* 2, 54.

J. D., the father of W. D., was tenant of a farm in the county of Wexford, from which he was evicted in 1889. W. D. was a tea-dealer at Carrick-on-Suir, and after the passing of the Land Act of 1903, he applied to the Estates Commissioners, as the son of an evicted tenant, for a farm. In 1905 the Estates Commissioners allotted to him a farm near Swords, in the county of Dublin, and the entire purchase-money was advanced to W. D. by the Estates Commissioners, subject to an annual instalment of £52. The lands were vested in him, and, on the 18th November, 1905, he was registered as owner in fee-simple in the Local Registration of Title Office.

On the 25th January, 1906, W. D. put up the farm for sale by auction, and it was sold to S. for £400. In investigating the title it was found that W. D. had been adjudicated bankrupt in 1898, but he had never obtained a certificate of conformity. The assignees in bankruptcy having intervened, and claimed the interest in the lands for the creditors:—

Held (affirming the decision of Boyd, J.), that the assignees were entitled to sell the lands for the benefit of the creditors.

John Doyle, the father of the bankrupt, was tenant of a farm at Gurteen, Coolgreany, in the county of Wexford, which he held from Sir G. Brooks, at £90 9*s.* 8*d.* rent; and he was evicted from his holding in the year 1887. By reason of that fact, the bankrupt, William Doyle, who was a tea-dealer, residing at Carrick-on-Suir, applied to the Estates Commissioners for a farm, and in 1905 the Estates Commissioners allotted to him a farm of land at Deanstown, near Swords, in the county of Dublin, containing 51A. 3R. 39P. statute measure. The entire purchase-money for the farm, viz. £1,600, and £250 for buildings, was advanced to the bankrupt by the Estates Commissioners, and the yearly instalment payable to the said Commissioners, on foot of the advance, was £52. The lands were vested in the bankrupt by

(1) Before Sir Samuel Walker, C., and FitzGibbon and Holmes, L.JJ.

a *fiat* of the Estates Commissioners, dated the 11th May, 1905, and on the 18th November, 1905, he was registered as the owner in fee-simple in the Local Registration of Title Office.

On the 25th January, 1906, the bankrupt put up the lands for sale by auction, and they were sold to Robert G. Smyth for £400. In investigating the title, the solicitor for the purchaser discovered that the vendor had been adjudicated bankrupt on the 31st January, 1898, and that he had never got a certificate of conformity.

The assignees in bankruptcy intervened, and claimed the interest in the lands for the creditors; and they entered into an agreement, dated the 19th May, 1906, with the said R. G. Smyth to sell to him the interest for £400. On the 18th June the assignees applied to the Court of Bankruptcy to confirm the sale.

BOYD, J., on the 10th July, gave judgment, and confirmed the agreement. The bankrupt appealed.

Ignatius J. O'Brien, K.C., for the appellant:—

The interest in lands does not vest in the assignees under section 268 of the Bankruptcy Act, 1857, unless they elect to take: *Hanway* v. *Taylor* (1); the effect of this decision was extended in *Somers* v. *M'Donnell* (2) to leases for lives. All dealings of a bankrupt, after his bankruptcy, with any person dealing with him *bonâ fide*, and for valuable consideration, in respect of his after-acquired property, are valid against the assignees: *Re Ball* (3); that rule applies to leaseholds: *Re Clayton and Barclay's Contract* (4); *New Land Development Association* v. *Gray* (5).

Again, the words of sect. 268 of the Bankruptcy Act of 1857 do not apply to this case. The words "as he shall purchase" do not apply to advances made by the State for the benefit of evicted tenants or their sons. The object of sect. 2 of the Land Act was the re-instatement of evicted tenants, and statutory provisions of this sort did not exist in 1857. In this case the

(1) I. R. 8 C. L. 254.
(2) 5 New Ir. Jur. 192.
(3) [1899] 2 I. R. 313.
(4) [1895] 2 Ch. 212.
(5) [1892] 2 Ch. 138.

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bankrupt had no previous interest in the tenancy at all, and the case is not within the vesting section.

Secondly: assuming that the interest vested in the assignees, the Land Act of 1903 has provided the machinery by which the interest is to be sold. By sect. 54, sub-sect. 1 (*b*), the Land Commission may cause the holding to be sold, and by the proviso at the end of sub-sect. 1 of sect. 54 the Land Commission may nominate a person to take the holding. The Land Commission has jurisdiction to deal with the case otherwise than in bankruptcy.

Ronan, K.C., and *Robert Doyle*, for the assignees:—

It is settled law, with respect to after-acquired property of a bankrupt, that the bankrupt may hold it unless the assignees intervene. The authorities were all referred to in *Re Ball* (1); but here the assignees intervened, and the interest in the farm passed to them. Section 54 of the Act of 1903 does not repeal the vesting section of the Bankruptcy Act; but sub-sect. 1 (*b*) provides that, in case of bankruptcy, the Land Commission may sell, but then they are to distribute the purchase-money among the persons legally entitled. Similar provisions were contained in the Land Law Act, 1881, sects. 30 and 31. The proviso at the end of sect. 54 refers only to the immediately preceding sub-clause (*c*), and not to sub-clause (*b*).

Nov. 6.

SIR SAMUEL WALKER, C.:—

The facts of this case are fully stated in the judgment of Boyd, J. It appears that William P. Doyle was the son of a tenant on an estate who had been evicted, and under the provisions of the 2nd section of the Irish Land Act, 1903, the Estates Commissioners made an advance to him of £1600 for the purchase of the farm in question, and on the 11th May, 1905, an order was made vesting the lands in him, subject to the Government annuity of £52. The lands contain 51A. 3R. 39P., and are situate in the county of Dublin.

The purchaser, Doyle, advertised the lands for sale by auction

(1) [1899] 2 I. R. 313.

on the 25th January, 1906, and one Smyth bid for them a sum of £400, and was declared the purchaser. The purchaser, however, refused to complete, as he found that the vendor, Doyle, was an uncertificated bankrupt.

It appears that Doyle, a trader, had been adjudicated bankrupt on the 31st January, 1898. The assignees, having ascertained the above facts, intervened, and claimed the interest of the bankrupt in the purchased lands, and they sold the lands to Smyth for the same sum of £400, and served a notice to have the sale confirmed, upon which the present question was raised. The substantial question to the parties is whether Doyle's creditors in the bankruptcy, or Doyle himself, are entitled to receive the £400.

The assignees rest this application on the 268th section of the Bankruptcy Act, 1857. [The Lord Chancellor read the section.] This property is within the very words of that section ; it is property which he has acquired with State money, and, beyond doubt, it has "come to him." The fact that the money has been lent him by the State in consideration of an annuity cannot make a difference.

The first question in the case is whether it falls within the principle on which in this Court in *Ball, a Bankrupt* (1), following a number of English cases, beginning with *Herbert* v. *Sayer* (2), we held that where a man had been adjudicated a bankrupt, and after the adjudication, and before discharge, became entitled to a legacy under a will, the executors under which *bona fide*, and without notice of the bankruptcy (the assignees never having intervened or made a claim), paid the legacy to the bankrupt, the assignees could not afterwards compel the executors to pay the amount of the legacy over again to them. That case depended, and so did the English authorities, on a section the same as sect. 267 of our Bankruptcy Act ; but I am content to assume, though I do not decide, that sect. 268 would be open to the same considerations. The principle is that where the property is acquired after the adjudication, and the assignees do not intervene and disaffirm the title of the bankrupt, his dealings with the property *bona fide* before intervention are valid. As Tindal, C.J., says in *Herbert* v. *Sayer* (2), the rule "is most consistent with convenience,

(1) [1899] 2 I. R. 313, 322. (2) 5 Q. B. 965.

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for otherwise there would be no protection to a person dealing with an uncertificated bankrupt." The plea there was held bad, because it did not aver that the assignees had intervened and required the defendant to pay to them. In the case before the Court the assignees have intervened, and claimed the property as theirs before it has passed from the bankrupt; and, therefore, the element of inconvenience and the considerations on which all these cases turned are absent.

It was next contended on behalf of the appellant that the jurisdiction of the Bankruptcy Court was excluded by certain provisions of the Land Code. The first referred to was the 54th section of the Act of 1903, which enacts that "as between the Land Commission and the proprietor for the time being of any holding for the purchase of which the Land Commission have, after the commencement of this Act, made any advance under the Land Purchase Acts, the following conditions shall be imposed, that is to say":—Sub-section 1 (*b*) deals with the case after title "is divested" by bankruptcy, *i.e.*, occurring after the advance, and the proviso which was mainly relied upon obviously refers to 1 (*c*), and deals with what is to happen after the decease of the proprietor.

Section 30 of the Act of 1881, which was also referred to, is practically the same as sect. 54 of the Act of 1903. Sub-section 3 of sect. 30 provided that the Land Commission should apply the balance of the proceeds derived from the sale in payment to the persons appearing to the Land Commission to be for the time being entitled to receive the same. Those latter words were repealed by the Act of 1896, and by sect. 8, sub-sect. 4, there is substituted—"Where the Land Commission sell a holding the purchase-money shall, subject to the provisions of sect. 30 of the Land Law (Ireland) Act, 1881, be paid and distributed as if it were the purchase-money of a holding sold by a landlord to a tenant." Those provisions in no way interfere with the absolute vesting of the lands in the assignees when they intervene, and have an entirely different scope, viz., a right of realisation by the Land Commission for the payment of the amounts charged and ascertained to be charged on the lands, and payment of the balance to the persons entitled, who here would be the assignees. The

118th General Order of the rules under the Land Law Acts, 1881 to 1896, contemplates a sale by assignees in bankruptcy of the tenant, and provides for notice of the sale being given to the landlord. This is all treated as consistent with the provisions in sect. 30 of the Act of 1881, and I do not think it was intended to interfere with the bankruptcy law, or administration under it, in a case like the present, where the assignees are simply selling, subject to the Government annuity, in order to pay the creditors in the bankruptcy.

It appears further that notice has been served on the Estates Commissioners, and they decline to interfere. The conflict here is not between the assignees and the Land Commission, but between the assignees and the bankrupt himself.

The appeal must be dismissed with costs.

FITZGIBBON, L.J. :—

I entirely concur.

HOLMES, L.J. :—

The appellant, coming within one of the descriptions contained in sect. 2, sub-sect. 1, of the Irish Land Act, 1903, purchased, by means of an advance made under the provisions of that statute, a parcel of land with which he had no previous connection, and which was duly vested in him subject to an annuity payable to the Land Commission. Some years before the purchase, he had been adjudicated a bankrupt, but he had never passed his final examination, and consequently had not obtained a certificate of conformity.

The question for our consideration is whether the interest he thus acquired in the parcel of land is now vested in his assignees. The language of sect. 267 of the Irish Bankruptcy Act is singularly clear and exhaustive, and if that section were now under judicial consideration for the first time, it would be difficult to draw any distinction between property belonging to the bankrupt at the time of his adjudication and property coming to him in any way before he has obtained his certificate. By what seems to me the plain words and meaning of the section both of these classes of property would vest automatically in the assignees. From a very early period, however, a distinction was drawn in cases of high

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authority decided on a corresponding provision in English Bankruptcy law. These cases were fully considered and followed by this Court in *Re Ball* (1), and the proposition there laid down was that the vesting of after-acquired property in the assignees is not immediate or unconditional. Such property remains in the bankrupt until his assignees intervene, *i.e.*, do some act to assert their title to it, which intervention is a condition precedent to its vesting in them. It follows that if there is such intervention the assignees become entitled to the property, which must in such case be administered by the Court for the benefit of the creditors.

In the present case, it is admitted that the assignees have asserted by very pointed action their right to the bankrupt's interest in the purchased land; and unless it can be shown that the provisions of the 267th section have been lately altered or amended by statute, the appeal must fail. This cannot be done. The only Act referred to is the Irish Land Act, 1903, and it is suggested rather than argued, that it can hardly be assumed that the Legislature would authorize the advance of State funds for the purchase of land by a person whose creditors would be immediately entitled to deprive him of it. It must be remembered, however, that no distinction is drawn by the Statute, as far as I am aware, between a case like that of the bankrupt who had no previous interest in the purchased land and the purchase with money advanced under the Act of the inheritance of land by a man previously a tenant thereof, and as such having a valuable property therein. In the last case, it would be the height of injustice to say that, in the event of the purchaser becoming bankrupt, his assignees could not apply this property for the benefit of his creditors. It is admitted that if Doyle were not a bankrupt, he could sell the holding the day after the vesting order; or that his creditors at that date might make the land available for the payment of their debts by having him adjudicated a bankrupt. I am satisfied, therefore, that no argument can be drawn from the general policy of the Act.

The 54th section has been referred to, but it does not help

(1) [1899] 2 I. R. 313, 322.

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the appellant. Sub-section 3 (*c*) has no bearing on the question before us—a view with which I understand the Land Commission concurs. Sub-section 3 (*b*) assumes that the title of the holding is divested by the bankruptcy of the proprietor; and, while it authorizes in such case a sale by the Land Commission, I have no doubt that the purchase-money, subject to the rights of the Land Commission therein, would go to the assignees. I am satisfied that the appeal cannot be sustained.

Solicitor for the bankrupt: *Eugene Collins.*

Solicitors for the assignees: *Bennett Thompson & M'Laughlin.*

R. D. M.

GREGG & CO. *v.* FRASER & SONS (1).

(1904. No. 15,289.)

K. B. Div. 1905.

Nov. 17, 20, 21, 22. 1906.

Jan. 15.

Appeal. April 23, 24.

Sale of goods—Contract—Construction—Arbitration clause—Valid award a condition precedent to action—Acquiescence—Laches—Estoppel by conduct.

The plaintiffs, who carried on business in Belfast, contracted with the defendants, timber merchants in Canada, for the purchase of a quantity of timber, "warranted to be of fair average quality, of the sellers' usual shipment." The contract contained an arbitration clause, as follows: "Should any difference arise under this contract, the buyers shall not reject the goods, if shipped, nor refuse payment; . . . but such dispute shall be referred to two arbitrators in the trade . . . having power to appoint an umpire, who shall decide whether any, or what, allowance shall be made; the decision of such arbitrators or their umpire shall be final and binding on buyers and sellers, and this submission shall, and may, be made a rule of H. M. High Court of Justice."

There were three shipments of cargo, the two first being, as the plaintiffs alleged, below contract quality; and this was so found by the jury, to whom the question was left for the purpose of assessing contingent damages. An arbitration was held in respect of the two first shipments, which, it may be taken for the purposes of this report, resulted in an invalid award.

(1) In the King's Bench Division, before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

K. B. Div. 1905.

GREGG *v.* FRASER.

In an action on the award, and for breach of warranty:—

Held, on the construction of the contract, that a valid award was a condition precedent to enforcing liability under the warranty.

The limits beyond which parties in such a case may, by acquiescence, laches, or conduct constituting an estoppel, preclude themselves from objecting to the validity of the award considered in the King's Bench Division.

Dawson v. *Fitzgerald* (1 Ex. D. 257) considered and distinguished.

NEW TRIAL MOTION.

This action, which was tried before the Right Hon. the Lord Chief Baron and a special jury at the Belfast Summer Assizes, 1905, was brought by the plaintiffs to recover £720 15*s.* 8*d.* alleged to be due by the defendants to the plaintiffs under an award dated 1st November, 1904, and made under a submission by the plaintiffs and defendants of certain matters hereinafter mentioned in difference between them, and in the alternative claiming damages for breaches of warranty in respect of three shipments of timber made by the defendants, a firm of timber exporters carrying on business in Canada, to the plaintiffs, a firm in Belfast. The timber was shipped under the following contract:—

"3*rd March*, 1904.—Bought of Messrs. Donald Fraser & Sons, Cabano, P.Q., sold to Messrs. Gregg & Co., Belfast, through Gellibrand, Heywood & Co., London, the following wood goods, of the specification stated below, for shipment at River-du-Loup.

"The goods are warranted to be of fair average quality of the sellers' usual shipment from port of loading, and to be delivered to the ship in accordance with the customs of the port, the sellers not being responsible for any deterioration occasioned by circumstances beyond their control after the goods have been sent alongside the vessel.

"A margin of 5 per cent., more or less, to be allowed on total contract quantity.

"Payment by approved acceptances to sellers' or agents' drafts, payable in London, at four months from sight of bill of lading, or, at buyers' option, in cash less discount at 5 per cent. per annum, on receipt of and in exchange for shipping documents and insurance policy, equal to Lloyd's.

"Property in goods to be deemed for all purposes, except retention of vendors' lien for unpaid price, to have passed to buyers, when goods put on board.

"In case the shipment of any of the goods be delayed or hindered by war, fire, drought, ice, strike, or any cause beyond the control of the shippers, they shall not be responsible for any damages resulting to the buyers therefrom.

"No claim will be recognized by sellers upon any goods shipped under this contract, unless made within seven days from date of ship's final discharge, and no claim will be allowed upon any parcel broken into.

"Marine insurance on cargo and/or freight advance to be covered by sellers or their agents.

"Buyers to adopt charter-party and bill of lading, and the freight to be deducted in invoice and paid by them in accordance therewith; the balance of invoice to be paid for as above. Should any vessel chartered under such contract be lost previous to loading, sellers have the option of cancelling the contract to such an extent upon giving notice to buyers, in that case, however, leaving buyers the option of taking the goods at a corresponding f.o.b. price.

"Should any difference arise under this contract, the buyers shall not reject the goods, if shipped, nor refuse payment for same as above stipulated, but such difference shall be referred to two arbitrators in the trade, one to be chosen by each party, said arbitrators having power to appoint an umpire, who shall decide whether any, or what, allowance shall be made; the decision of such arbitrators or their umpire shall be final and binding upon buyers and sellers, and this submission shall, and may, be made a rule of His Majesty's High Court of Justice. The cost of the arbitration to be borne as directed by arbitrators or umpire. In case of the non-compliance by the buyers with any of the terms of this contract, sellers to have immediate power of re-sale.

"All prices are per St. Petg. Std. Hd., cost, freight, and insurance to Belfast.

[Then followed the specifications of the timber to be shipped.]

"The goods are to be shipped by 'Head Line' steamers as follows, or as may be mutually arranged subsequently, say, about

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one-third of quantity per 30*th June*, excepting 4½-inch widths, ... About one-third of quantity per *First Half August*, and about one-third per 15*th*/30*th September*, or later if convenient to shippers.

" . . . Each shipment to be considered as a separate contract, but buyers will allow any divergence from contract specification to be adjusted in the final shipment, should such divergence occur through the fault of the steamship, or the goods be shipped reasonably in accordance with above.

" GELLIBRAND, HEYWOOD, & Co., as Agents,
57, Gracechurch-street, London, E.C.
" GREGG & Co., Belfast."

The first shipment arrived in Belfast in the month of July, 1904, its quality being, as the plaintiffs alleged, not up to contract quality, the value of the depreciation of it under contract amounting to £592 13*s.* The second cargo arrived in September, and was, the plaintiffs alleged, of inferior quality to the first, the value of its depreciation being calculated at £1,108 4*s.* 5*d.* The plaintiffs and defendants then entered into a submission for arbitration, the plaintiffs appointing one William Agnew, and the defendants John Buchanan, their respective arbitrators. The arbitration was held on the 15th October, 1904, and resulted in a disagreement between the two arbitrators, who appointed one W. J. Longstaff as umpire. Longstaff inspected the cargoes on the 24th day of October, 1904, and made his award on the 1st November, 1904, allowing £690 10*s.* and £30 5*s.* 8*d.* costs in respect of the first two cargoes. The third cargo arrived on the 7th of October, the shipping documents being seven days late. The depreciation of this cargo, under contract value, was assessed by the plaintiffs at £571 11*s.* 9*d.* On the 8th November, 1904, the plaintiffs appointed Mr. Agnew their arbitrator in respect of this cargo, and the defendants appointed Mr. Buchanan. The arbitrators met on the 7th December, when Buchanan refused to arbitrate, or to join in appointing an umpire, on the ground that the plaintiffs were late in sending in notice of their claim. No arbitration was ever in fact held in respect of the third cargo.

The further facts of the case will appear from the judgments.

The plaintiffs, by their amended statement of claim, claimed payment of the said sum of £720 15*s.* 8*d.* under the award of W. J. Longstaff, and in the alternative they relied upon the contract of the 3rd March, 1904, and claimed damages for the alleged breaches of warranty in respect of each of the three shipments of timber.

The defendants, by their defence, impeached the validity of the award on the grounds (*inter alia*) that the time limited for the making thereof had expired before the date of the award, and that it was not made in accordance with the terms of the submission. They also traversed the alleged breaches of warranty, and relied on the above-mentioned term of the contract, that should any difference arise under the contract, such difference should be referred to arbitration, as therein provided. They contended that the questions at issue in this action constituted a "difference" within the terms of the contract, and that in the circumstances the action did not lie.

At the close of the plaintiffs' case, counsel for the defendants asked for a direction on the grounds:—

As to the cause of action on the award, that the award was bad, on the grounds: (*a*) That it was late; (*b*) that no notice was given to the defendants of the umpirage; (*c*) that the award did not discriminate between the two consignments, which were to be treated as separate contracts; (*d*) that no one was allowed to be present on the part of the defendants, or to give evidence as to the identity of the timber.

On the cause of action on the contract:—

1. That a valid award was a condition precedent to the right of action.

2. As to the third consignment, that bulk having been broken without consent, the claim on the contract was not maintainable.

The learned Judge reported that he was of opinion that the award was bad on the ground that it was late, and further, on the ground that it did not award separate sums in respect of each of the two consignments. He was further of opinion that the

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further causes of action were not sustainable, on the ground that a valid award was a condition precedent to the right of action. In order, however, to prevent the possibility of a second action, his Lordship allowed the action to proceed.

The following were the questions left to the jury, the answers to which are appended:—

1. Was the timber in each of the three shipments equal to contract? *Answer*—No.

2. If not, assess the plaintiffs' damages separately in respect of each shipment which you are of opinion was not equal to contract. *Answer*—First shipment, £230; second shipment, £460; third shipment, £105; total, £795.

3. Was the award delayed beyond the 25th October, 1904, by the omission of Mr. Buchanan, the arbitrator appointed by the defendants, to send his report to the umpire? *Answer*—Yes.

4. Was the award made within a reasonable time after the report of Mr. Buchanan was received by the umpire? *Answer*—Yes.

5. Were the plaintiffs ready and willing to submit their claim in the third shipment to an arbitration? *Answer*—Yes.

6. Did the defendants, by their conduct and by that of their agents subsequently to notice of the award, cause the plaintiffs to believe, and to act upon the belief, that they would not object to the award upon the ground that it was made after the expiration of the time, and if so, did the plaintiffs so believe, and act upon such belief? *Answer*—Yes.

The jury, upon the direction of the learned Judge, found for the defendants, and judgment was entered for the defendants with costs.

The plaintiffs now applied for an order that the judgment entered for the defendants at the trial should be set aside, and that judgment should be entered for the plaintiffs for the sum of £795, and the costs of the action, on the ground that the judgment directed for the defendants was wrong in law having regard to the findings of the jury.

Gordon, K.C., Harrison, K.C., and *Hanna*, for the plaintiffs.

Serjeant Dodd, *Moore*, *K.C.*, and *Megaw*, for the defendants.

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The arguments in the King's Bench Division were in substance the same as in the Court of Appeal, reported *infra*, p. 570.

LORD O'BRIEN, L.C.J.:—

1906. Jan. 15.

The main facts of this case are as follows:—The defendants, by instrument in writing, contracted with the plaintiffs to supply them with certain timber, and by that instrument in writing warranted that the timber should be of a certain specified description and quality. There was also contained in the instrument the following provision, upon which the principal controversy arises:—

"Should any difference arise under this contract, the buyers shall not reject the goods, if shipped, nor refuse payment for same as above stipulated, but such difference shall be referred to two arbitrators in the trade, one to be chosen by each party, said arbitrators having power to appoint an umpire, who shall decide whether any, or what, allowance shall be made; the decision of such arbitrators or their umpire shall be final and binding upon buyers and sellers, and this submission shall, and may, be made a rule of His Majesty's High Court of Justice. The cost of the arbitration to be borne as directed by arbitrators or umpire. In case of the non-compliance by the buyers with any of the terms of this contract, sellers to have immediate power of re-sale."

This is the provision upon which, as I said, the principal controversy arises. An action was brought by the plaintiffs on an award, and for breach of warranty, and the defendants allege, as the fact was, that the award was bad as not having been made within the prescribed time, and, relying upon the provision I have read, contended that it was a condition precedent to the plaintiffs' right to sue that there should have been an arbitration and award legally effectual under the clause in question. There was an award in point of fact, but it was not, as I have said, made within the prescribed time, and was, therefore, bad. I will at least assume for this part of my judgment that the defendants are not precluded from contending that it was invalid. I shall assume the award to have been ineffectual whilst discussing the question on the count for breach of warranty, namely, what was the true character of the

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so-called arbitration clause, whether it was a merely collateral agreement or whether compliance with it was a condition precedent to a right of action: *Scott* v. *Avery* (1) is the leading authority on this subject. The true limits of that decision have been the subject of much controversy. Did it sanction an agreement wholly ousting the jurisdiction of the Courts, or did it stop short of such a result? Notwithstanding the opinion of Baron Martin, it has been held that it did not sanction any such agreement. Lord Cranworth, in giving judgment in that case in the House of Lords (see p. 847), is reported to have said—"There is no doubt that where a right of action has accrued, parties cannot by contract say that there shall not be jurisdiction to enforce damages in respect of that right of action. Now this doctrine depends upon the general policy of the law, that parties cannot enter into a contract which gives rise to a right of an action for the breach of it, and then withdraw such a case from the jurisdiction of the ordinary tribunals. But surely there can be no principle or policy of the law which prevents parties from entering into such a contract as that no breach shall occur until after a reference has been made to arbitration. It appears to me that in such cases as that, the policy of the law is left untouched."

I find in the same case (see pp. 853 and 854 of the report) that Lord Campbell said:—

"But I am glad to think that there is no case that I am aware of that will be overturned by your Lordships affirming the judgment now in dispute. Because all that has been hitherto decided in *Thompson* v. *Charnock* (2), and the other cases referred to, is this, that if the contract between the parties simply contains a clause or covenant to refer to arbitration, and goes no further, then an action may be brought in spite of the clause, although there has been no arbitration. But there is no case that goes the length of saying that where the contract is, as it is here, that no right of action shall accrue until there has been an arbitration, then an action may be brought, although there has been no arbitration. Now, in this contract of insurance it is stipulated, in the most express terms, that until the arbitrators have determined, no

(1) 5 H. L. Cas. 811. (2) 8 T. R. 139.

action shall lie in any Court whatsoever. That is not ousting the Courts of their jurisdiction, because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined."

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True, that in the case before us there is no express provision that until the arbitrator or umpire has made an award no action shall lie; but if an intention to this effect is plainly inferable from the language used, the result is the same.

Before I apply myself to the language of the arbitration clause in this case I desire to refer to what Lord Esher (then Mr. Justice Brett) said in the case of *Edwards* v. *The Aberayron Mutual Ship Insurance Society* (1). He is reported, at page 596 of the report, to have said:—

"The true limitation of *Scott* v. *Avery* (2) seems to me to be that which was expressed in it, and which, as I have pointed out, has so often been expressed about it, that if parties to a contract agree to a stipulation in it, which imposes, as a condition precedent to the maintenance of a suit or action for a breach of it, the settling by arbitration the amount of damage, or the time of paying it, or any matters of that kind, which do not go to the root of the action, *i.e.*, which do not prevent any action at all from being maintained, such stipulation prevents any action being maintained until the particular facts have been settled by arbitration; but a stipulation in a contract which in terms would submit every dispute arising on the contract to arbitration, and so prevent the suffering or complaining party from maintaining any suit or action at all in respect of any breach of the contract, does not prevent an action from being maintained; it gives, at most, a right of action for not submitting to arbitration, and for damages, probably nominal. And the rule is founded on public policy. It in no way prevents parties from referring disputes, which have arisen, to arbitration; but it does prevent them from establishing as it were, before they dispute, a private tribunal, which may from ignorance do what the invented tribunal here did, namely, act in contravention, and insist on acting in contravention, of the most elementary principles of the administration of justice."

(1) 1 Q. B. D. 563. (2) 5 H. L. Cas. 811.

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This is what Lord Esher said after an exhaustive view of the authorities. There is a succinct statement of the law on this subject by the Lord Chief Baron in the case of *Gorman* v. *Hand-in-Hand Insurance Co.* (1). He said:—"The law upon the matter has been, at least since *Scott* v. *Avery* (2), and, as I believe, from a far earlier period, settled beyond controversy. That law, as I understand, is that if two or more persons, whether in the instrument which creates the liability, or in any other way, agree to refer the matter on which that liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement be, not simply to pay a sum of money, or to do an act, but to pay such sum of money, or do such an act, as a third person shall ascertain or direct, or to pay a sum of money or do an act in a certain event, such, for instance, as an arbitrator arriving at a certain conclusion, in any of these cases no cause of action arises unless, in the one case, that third person has so ascertained or directed, or, in the other, the stipulated event has happened. The question is, in every case, one of construction of the instrument—What is the meaning of the parties as evidenced by the language they have used?" Then, bearing in mind what Lords Cranworth and Campbell said in *Scott* v. *Avery* (2), and what Lord Esher said in *Edwards* v. *The Aberayron Mutual Insurance Society* (3), and what the Lord Chief Baron said in *Gorman* v. *Hand-in-Hand Insurance Co.* (1), I turn to the clause before us, premising, as Lord Cranworth said in *Scott* v. *Avery* (2), that we have to deduce the intention of the parties from the language used by them in the instrument of contract. What, then, is that language? I have already set it forth at length. It is, in my opinion, in its essence, a provision to maintain the existence of the contract by providing that in case of damage, shortage, or defect of quality, an "allowance" shall be made. It is not a mere collateral agreement, but is a provision which creates a condition precedent to the right to sue, that the arbitrators or an umpire shall, as an exclusive authority, determine the amount of the allowance to be sued for. The function of the arbitrators was to determine what amount (if any) was to be "allowed." The words "who shall

(1) I. R. 11 C. L. 224, at p. 233. (2) 5 H. L. Cas. 811. (3) 1 Q. B. D. 563.

decide what allowance is to be made" are all-important. The clause prescribes a function for the arbitrators or umpire to discharge, and constitutes the arbitrators or umpire the sole tribunal to discharge that function. In case of default of the character I have mentioned an "allowance" was to be determined by the arbitrators or umpire, and when that was done the jurisdiction of the Court of Law attached to enforce payment of the "allowance." This was no ouster of the jurisdiction of the Courts; it was merely the creation of a condition precedent to their jurisdiction attaching. I refer again to what Lord Campbell said in *Scott* v. *Avery* (1), that is to say, the proceedings in arbitration and award "is not ousting the Courts of their jurisdiction, because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined" (see p. 854).

It appears to me that this case falls within the proposition laid down by the Lord Chief Baron in *Gorman* v. *Hand-in-Hand Insurance Company* (2). Looking at the instrument of contract as a whole, I think the agreement is to pay a sum of money in a certain event, that is to say, to pay an allowance if made by the arbitrators or umpire as the case may be.

The provision that the award shall be final and binding on all parties means that so far as relates to its true function, that is to say, the determination as to whether an allowance is to be made or not, it shall be final and binding on all parties. It had not in any way the effect of preventing access to the Courts to enforce payment once an award was made. I am of opinion that this case falls within the principle laid down in *Scott* v. *Avery* (1), that the agreement as to arbitration does not oust the jurisdiction of the Courts, but merely creates a condition precedent to the right to sue. Upon this subject there is a multitude of cases to be found in the books. In many of them very fine, almost impalpable, distinctions are drawn, but the question always resolves itself into this —What is the true construction of the language of the particular document regarded as a whole? and, regarding it as a whole, I am of opinion that non-compliance with the arbitration clause may be relied upon as a good defence to the action on the merits. Indeed,

(1) 5 H. L. Cas. 811. (2) I. R. 11 C. L. 224.

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if I were to read this document in the light of its surroundings as though it were nailed down on a counter in one of the offices of the contracting parties, and saw that those who sold lived in Canada, and those who bought lived in Ireland, and that the subject in hand was a business matter, I certainly should be confirmed in the opinion I have formed from a consideration of the language of the instrument. A speedy, economical tribunal, with expert knowledge, in no way likely to be influenced by local prejudices, would, I am sure, appear preferable to a tribunal attended with more expense and delay, and composed of persons empanelled at haphazard, and bringing to bear on a matter of trade crude and uninstructed impressions. No such considerations would apply when the function of a jury would be to enforce payment of a sum awarded by an expert tribunal. This doctrine as to the alleged ouster of the Courts of Law, though certainly recognized and not abrogated by the decision in *Scott* v. *Avery* (1), yet was not received with great favour by Lord Cranworth or Lord Campbell. The latter, at page 853 of the report, is stated to have said :—

"Then, my Lords, when we come to the decided cases, if there had been any decision which had not been reviewed by your Lordships, which adjudged such a contract to be illegal, I should ask your Lordships to reverse it; for it would seem to me really to stand on no principle whatsoever. It probably originated in the contests of the different Courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would altogether deprive every one of them of jurisdiction."

This is the language of Lord Campbell. Perhaps, one of the most persuasive of the answers of the Common Law Judges to the questions proposed by the Lords in *Scott* v. *Avery* (1) was that of Mr. Justice Coleridge. He is reported, at page 843 of the report, to have said :—

"I certainly am not disposed to extend the operation of a rule which appears to me to have been founded on very narrow grounds, directly contrary to the spirit of later times which leaves parties at full liberty to refer their disputes at pleasure to public or private

(1) 5 H. L. Cas. 811.

tribunals. And I think the judgment of the Court of Exchequer Chamber stands on a safe distinction between an agreement which would close entirely the access to the courts of law, and that which only imposes as a condition precedent to the appeal to them, that the parties shall have first settled by an agreed on mode the precise amount to be recovered there."

I now turn to the other portions of the case. It was admitted that the award, being made late, was invalid; but it was contended that the defendants were precluded from relying upon its invalidity. Having regard to this contention, it is very requisite to see what was pleaded, what questions were left to the jury, and what was the reservation of the Lord Chief Baron. I shall read what he says. After stating what Serjeant Dodd's requisitions were, he proceeds:—

"I was of opinion that the award was bad on the ground that it did not award separate sums in respect of each of the two consignments.

"I was further of opinion that the other causes of action were not sustainable on the ground that a valid award was a condition precedent to the right of action; but, as I was informed that witnesses were present from Canada, I thought it better to allow the action to proceed in order to prevent the possibility of a second trial."

This was at the close of plaintiffs' case. Later on in his report, dealing with what took place at the close of the defendants' case he stated:—"I retained the opinion I had formed at the end of the plaintiffs' case that the defendants were entitled to have a verdict directed for them; but I said that in order that the result of the trial might finally determine all questions between the parties, I would leave to the jury any questions which the plaintiffs' counsel desired to have left, and that I would also allow any amendments in the pleadings which they might desire. After some controversy as to the frame of the questions, I left to the jury those mentioned in my registrar's certificate, to which I refer.

"Neither party asked me to leave any other questions to the jury; and the pleadings are to be deemed to be amended in any way necessary to determine the defendants' liability, having regard to the answers of the jury to those questions. The answers to the questions appear in the registrar's certificate."

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This, then, is what the Chief Baron says. He was of opinion (and I agree with his opinion on both points) that the award was bad in point of law as being late and as not having dealt separately with the two first cargoes. He states also that the pleadings are to be considered amended so as to give effect to the findings of the jury if they had under the circumstances any legal efficacy, which he plainly did not think they had. What, then, was left to the jury? It was pleaded that there was an agreement to enlarge the time for making the award (see paragraph 2 of the amended reply). This was abandoned; there was no such question left to the jury. It was also pleaded there was a waiver. This was also abandoned; there was no such question left to the jury. Acquiescence in the lateness of the award was pleaded, but no such question was left to the jury. (See paragraph 6 of the amended reply.) The dealings subsequent to the award had no reference at all to the time limited for making the award. The question was not present to the minds of the parties. There was no evidence of such knowledge, mental condition, or intention upon which either waiver or acquiescence is founded. Acquiescence to deprive a man of his rights (in this case to get over the obligation of a statute as to time) must amount to a fraud. The elements necessary to constitute fraud are referred to in detail by Mr. Justice Fry, in the case of *Willmott* v. *Barber* (1), and certainly it does not appear to me that these conditions exist in the present case; but, as I have said, these questions were not left to the jury. At the last stage of the trial, and so far as related to this point of the case in the argument before us, the contest was fought upon the effect of the sixth question. What, then, was the sixth question? I shall read it:—

"6. Did the defendants, by their conduct and by that of their agents subsequently to notice of the award, cause the plaintiffs to believe, and to act upon the belief, that they would not object to the award upon the ground that it was made after the expiration of the time, and, if so, did the plaintiffs so believe and act upon such belief?" *Answer*—"Yes."

Now this is the sixth question sworn to, *in globo*, by the plaintiffs. This was the *tabula in naufragio* of the case. Whatever

(1) 15 Ch. D. 96.

its effect, I do not think there was any evidence to sustain it. There is no evidence against the defendants personally (this is admitted), nor, in my opinion, against Gellibrand, even if he had authority—and it appears to me that he had no authority—to bind the plaintiffs in the way suggested in the question; but what is its effect? It purports to deal with matters subsequent to notice of the award. There is no evidence, in my opinion, that the defendants or Gellibrand made any representation whatever, directly or indirectly, with reference to the time within which the award was to be made, or to the binding character of the award, or to its validity or invalidity, or that they did anything to cause the plaintiffs to believe that they would not object to the award. There was no change whatever in the plaintiffs' action after notice of the award. They merely continued to do after notice of the award what they had done before, namely, sell the timber. Bulk had been broken before the award, and sales had taken place, and the identical process was continued after the award.

The plaintiffs were not in any way induced to change their position, nor did they do so.

On the whole case I am of opinion that the direction of the Lord Chief Baron was right, and that the application to change or set aside the verdict should be refused, with costs.

MADDEN, J.:—

This action is founded on a contract entered into on the 3rd March, 1904, between the plaintiffs, carrying on business in Belfast, and the defendants, who are timber merchants in Canada, for the sale of certain quantities of timber. "The goods are warranted to be of fair average quality of sellers' usual shipment." The contract contains an arbitration clause in the following terms: "Should any difference arise under this contract, the buyer shall not reject the goods if shipped, nor refuse payment for same as above stipulated, but such difference shall be referred to two arbitrators in the trade, one to be chosen by each party, said arbitrators having power to appoint an umpire, who shall decide whether any, or what, allowance shall be made. The decision of such arbitrators or their umpire shall be final." It

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further provides that the contract, treating it as an immediate submission to arbitration, might be made a rule of court.

The first question for our determination is: Under which of two well-recognized classes of cases does this arbitration clause fall? The warranty, taken by itself, would give rise to an immediate right of action in the event of breach. Is the arbitration clause an agreement, collateral with the warranty; in itself neither creating a right of action nor imposing a condition precedent to the enforcement of liability, but merely stipulating that any claim or difference which might arise under the contract should be submitted to arbitration? Notwithstanding such an agreement, an action could be brought on the warranty. The arbitration clause could not be pleaded in bar, the substantial remedy of the defendants being to move to stay the action under the provisions of the Common Law Procedure Act. This class of case is illustrated by *Roper* v. *Lendon* (1).

The defendants contend that the arbitration clause before us comes within a different category, the lawfulness of which has been recognized, at all events, since the decision of the House of Lords in *Scott* v. *Avery* (2). The parties to this agreement have, they say, stipulated that a right of action under the contract is to flow from the decision of the arbitrators or umpire upon a difference, and that the jurisdiction of the Court does not come into operation until after the award has been made, because until then no right of action has arisen. In other words, the making of the award is a condition precedent to enforcing liability under the contract, and the liability to be enforced is that created, not by the warranty, but by the agreement to pay the amount awarded.

Beyond laying down these general principles, now clearly established, decided cases afford little assistance in determining this question, which must depend in each case on the construction of the particular agreement. I therefore turn to the contract in the present case in which I find a provision which is not usual in arbitration clauses, and which is not found, so far as I am aware, in any agreements which have been held to be collateral only.

(1) 1 Ell. & Ell. 825. (2) 5 H. L. Cas. 811.

Arbitrators and an umpire are to be appointed "who shall decide whether any or what allowance shall be made."

It has been laid down that it is not necessary that there should be negative words, when by clear implication the arbitration and the award are a condition precedent to liability. There are negative words in this contract which are significant, although they do not expressly exclude every possible mode of enforcing a claim under the warranty. The buyer is not to reject the goods if shipped, nor is he to refuse payment for the same, as stipulated. It is said that although the buyer, finding the goods not up to warranty, must nevertheless take them, and pay the stipulated price, he is not precluded by these words, having paid for the goods, from having an action on the warranty. This is true, but a clause which provides that the buyer must take and pay for the goods, and go to arbitration on the question of allowance, lends itself readily to the view that his right to an allowance is dependent on arbitration, as a condition precedent. This I think is the fair meaning of the provision that the arbitrators are to decide whether any or what deduction is to be made. They are to be the tribunal so to decide, and the right to an allowance is to flow from their decision. These words seem to be at least as strong as the words in *Hamlyn & Co.* v. *Talisker Distillery* (1), "Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." Of this clause Lord Watson says: "The jurisdiction of the Court is not wholly ousted by such a contract. It deprives the Court of jurisdiction to inquire into and decide the merits of the case, whilst it leaves the Court free to entertain the suit, and to pronounce a decree in conformity with the award of the arbitrator."

The next question is whether the defendants, having regard to what has occurred, are in a position to raise the question of the invalidity of the award. I use these general terms, for I find it difficult to formulate, in strict legal language, the precise equity by which it is sought to bind them. There are a good many general topics which invite a careful and a favourable exami-

(1) [1894] A. C. 202.

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nation of the plaintiffs' case. They have in their favour the award of a skilled arbitrator, and the finding of a jury. Up to the delivery of the statement of defence the invalidity of the award was never suggested: on the contrary, a correspondence was carried on for months with the defendants' agents relating to various topics connected with the award, on the assumption of its validity; and, finally, the position of the plaintiffs has, as a matter of fact, altered considerably for the worse since the arbitration, inasmuch as they have disposed of the goods which would be the subject-matter of a new arbitration.

But although these circumstances call for the careful consideration which the plaintiffs' case received in this Court and at the hands of the learned Chief Baron, they will be found when analysed to fall short of the state of facts sufficient to create a personal equity affecting the defendants and disentitling them to rely on the invalidity of the award. What do they all amount to? During the arbitration and throughout the correspondence, there was a belief, common to both parties, that the proceeding was regular. I adopt the suggestion thrown out in argument that they read the time limit as applying to the inspection of the goods, no period being fixed for the award, which on this view of the submission should be made within a reasonable time. This construction of the submission has been abandoned, but it is not unreasonable to suppose that it may have been present to the minds of the parties.

I shall deal with the case for the present on the assumption that the defendants are bound by the conduct of Messrs. Gellibrand. To what does this conduct amount? It cannot be pushed further than tacit acquiescence in the plaintiffs' assumption that they had obtained a valid award.. Representation and estoppel are out of the case. The first question put to the jury was intended to raise a question of representation rather than acquiescence, which, although pleaded, was not left to the jury. But in any event it would have been impossible, on the evidence in the case, to hold the defendants precluded from disputing the validity of the award on the ground of acquiescence. This doctrine was discussed by Sir Edward Fry, then Fry, J., in *Willmott* v. *Barber* (1). It is, he

(1) 15 Ch. D. 96.

points out, founded on conduct, with a knowledge of legal rights. There is no finding that Gellibrand was aware of the invalidity of the award when he wrote the letters relied on by the plaintiffs, nor does the correspondence warrant us in drawing such a conclusion. On the contrary, I conclude that both parties were in the same position as regards such knowledge. Acquiescence therefore is out of the case. There are other difficulties in the plaintiffs' way when they seek to affect the defendants by a personal equity, founded on conduct. The jury have not found that Gellibrand had authority to bind the defendants by acquiescence or representation, although they may have intended this to be understood, as regards representation, by their answer to the sixth question. Such a finding would, in my opinion, be opposed to the evidence supplied by the correspondence. Without reading them I may refer to Messrs. Gellibrand's letters of the 4th October, 1904, the plaintiffs' letter of 3rd November, 1904, and Gellibrand's letter of 29th November, 1904. Again, I do not find any evidence to support the finding of the jury that the plaintiffs acted upon the belief that the defendants would not object to the award. This finding relates to the sale of the timber, which is not now forthcoming for the purposes of another arbitration. But this course of conduct was continuous on the part of the plaintiffs, and originated in the permission given them at their request to break bulk on the arrival of the cargoes. Even if Messrs. Gellibrand were principals, they could not be held responsible for omitting to apprise the defendants of an informality in the award of which they were ignorant, and which was equally patent to the observation of both parties, or their legal advisers.

On the whole case I am of opinion (1) that a valid award was, by the contract of the parties, a condition precedent to the existence and enforcement of liability under the warranty; (2) that the circumstances proved in the case fail to establish any personal equity affecting the defendants, disentitling them to rely on any invalidity which may exist in the award of the umpire.

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WRIGHT, J.:—

Since *Scott* v. *Avery* (1) it has been clearly settled that a person may contract that no right of action shall accrue until a third person has decided on any difference that may arise between himself and the other party to the contract. Lord Campbell, at page 852, says:—"There is an express undertaking that no action shall be brought until the arbitrators have decided, and there is abundant consideration for that in the mutual contract into which the parties have entered: therefore, unless there is some illegality in the contract, the Courts are bound to give it effect. There is no statute against such a contract; then upon what grounds is it to be declared illegal? It is contended that it is contrary to public policy; that is rather a dangerous ground to go upon; I say that with great deference before your Lordships, after the view that was taken in a very important case lately in this House; but what pretence can there be for saying that there is anything contrary to public policy in allowing parties to contract that they shall not be liable to any action until their liability has been ascertained by a domestic and private tribunal upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract." This may be done by express words, as in *Scott* v. *Avery* (1), precluding the party from having recourse to a Court of law until after arbitration, or the same result may follow in the absence of express words, where by clear implication an arbitration and award are made a condition precedent to enforcing liability by action. The principle is clearly expressed by Baron Bramwell in *Dawson* v. *Fitzgerald* (2). "If there be a covenant to pay in a certain event, and a separate and collateral covenant that, in case of difference, that difference shall be referred to arbitration, the two are distinct from each other, and one may be broken whether the other be broken or not; and it is no matter whether the two covenants are in different deeds, or in the same deed at different parts of it, or following each other consecutively. If, on the other hand, there is only a covenant to pay whatever upon arbitration

(1) 5 H. L. Cas. 811. (2) L. R. 9 Ex. 7, at pp. 10, 11.

shall be found to be due, then no action can be maintained until the arbitration has taken place"; and, in giving judgment on the appeal in the same case (1), Jessel, M.R., said:—"There are two cases where such a plea as the present" [*i.e.* a plea founded on an arbitration clause] "is successful—first, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant to pursue one of two courses, either to bring an action for not referring, or to apply under section 11 of the Common Law Procedure Act, 1854, to stay the action till there has been an arbitration." In that case it was held that there were two covenants, a covenant not to keep an excessive number of rabbits, and a separate covenant by the defendant that, if he did, he would pay a fair and reasonable sum as compensation to be ascertained by two arbitrators or an umpire. This principle of law has been repeatedly stated by judge after judge; amongst others, by Brett, L.J., in *Edwards* v. *The Aberayron Insurance Society* (2), and by the Lord Chief Baron in *Gorman* v. *The Hand-in-Hand Insurance Co.* (3). The passages I intended to quote have been already read by my Lord, and it would be a waste of time to read them over again. The principle is so well settled that it would, I think, be almost a waste of time to consider at length the several other cases cited in argument. In all the cases it was, as it is here, purely a question of the construction of the contract. What was the meaning of the parties to be drawn from the language they have used? On the true construction of the contract, is a right given to plaintiffs to sue for damages for breach of warranty of the cargo, with a concurrent, or independent, or collateral right, whichever it may be called, to go to arbitration; or is the remedy by arbitration an exclusive remedy, excluding the right to sue until there has been an arbitration and an award?

(1) 1 Ex. D. 257, at p. 260. (2) 1 Q. B. D. 563, at p. 596.
(3) I. R. 11 C. L. 224, at p. 253.

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By the contract the goods are warranted to be of fair average quality of sellers' usual shipment from port of loading, payment to be by four months bills from sight of bill of lading, or cash less discount; the property in the goods is to be deemed for all purposes, except retention of vendors' lien for unpaid price, to have passed to buyers when goods put on board; then follow several provisions, and finally comes the arbitration clause, which is in these terms:— "Should any difference arise under this contract, the buyers shall not reject the goods, if shipped, nor refuse payment for same, as above stipulated, but such difference shall be referred to two arbitrators in the trade, one to be chosen by each party, said arbitrators having power to appoint an umpire, who shall decide whether any and what allowance shall be made. The decision of such arbitrators or umpire shall be final and binding on buyers and sellers, and this submission shall and may be made a rule of His Majesty's High Court of Justice." This is the only clause in the contract which, in express terms, gives the buyers a remedy, and while there are no words expressly declaring, as in *Scott* v. *Avery* (1), that the decision of the arbitrators is to be a condition precedent to the right to maintain an action, the whole frame of the document leads me to the conclusion that this was the meaning and effect of it. The buyers *must* take the goods once they are shipped, notwithstanding any disputes or differences arising under the contract, and *must* pay for them, but they are to have a remedy, and that remedy is by reference to two arbitrators "in the trade," "who shall decide whether any or what allowance shall be made," and the decision of the arbitrators or umpire shall be final and binding upon buyers and sellers. The arbitrators are made judges, not merely of the amount, but also on the question of liability.

In my opinion, this is the only remedy given by the contract, and by it reference to arbitration, ending in an award, is made a condition precedent to the right to sue. As a matter of fact, disputes arose between sellers and buyers in reference to the first and second shipments; these disputes were referred to arbitration by submission dated September 27th, 1904, which provided that the umpire, in the event of the arbitrators not agreeing, should,

(1) 5 H. L. Cas. 811.

before the 25th October, inspect the shipment, and give his award. No award was made within the time, nor was the time for making it extended, and on the 1st November, after the date fixed by the submission, the umpire, Mr. Longstaff, made an award giving plaintiffs a lump sum of £690 without apportioning that amount between the two shipments. As to the third shipment, there was an abortive attempt to have arbitration, but it ended in nothing; and as to that shipment, there never was any award.

Taking, as I do, the view that arbitration ending in an award is by the contract made a condition precedent to the right to maintain an action, it follows that in my judgment, so far as regards any claim in respect of the third shipment, the action cannot be maintained; and, as regards the first and second shipments, the action also fails on the ground that the award was made after the proper time, at a time when the umpire had no jurisdiction or authority to make it. The award has been impeached on several grounds, but this one alone would be fatal to it, if there was nothing more in the case.

But plaintiffs' counsel rely on the acts and conduct of the defendants and their agents, *i.e.* Gellibrand, Heywood, & Co., after the making and publication of the award, as in some way validating it, or waiving any objection to it founded on the fact that it was made after the time had expired; and they contend that on the finding of the jury to the sixth question left to them, they are entitled to a verdict and judgment for £790. The question and answer are as follows:—"Did the defendants, by their conduct and by that of their agents subsequently to notice of the award, cause the plaintiffs to believe, and act upon the belief, that they would not object to the award upon the ground that it was made after the expiration of the time, and, if so, did the plaintiffs so believe and act upon such belief?" *Answer*—"Yes." It, therefore, becomes necessary to examine this finding, and the evidence on which it was based.

Plaintiffs, on the 7th of November, forwarded to Gellibrand, Heywood, & Co., defendants' brokers in London, a copy of the award, with a request for payment of the amount, and asking them to cable shippers to send the amount by return. Other letters followed, particularly the letter of November 29th from

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Gellibrand, Heywood, & Co. to plaintiffs, in which they write: "We are also in receipt of your telegram regarding payment of the award; we have received no funds from Messrs. Fraser to pay the award; nor have we any money of theirs in hand. We agree that there is a certain portion of the award, namely, that on the first parcel, due, as your bills for this have been paid. . . . . The award for the second lot is not due until the maturity of the bills, and we may as well tell you outright that we do not intend to pay it until then." To the same effect is the letter of Gellibrand, Heywood, & Co., dated the 2nd December, in which, writing in reference to plaintiffs' claim for payment of the full amount of the award at once, they say: "Whatever amount may reasonably be considered as due on the first shipment, we will obtain payment of, and also the balance when the bills for the second shipment are paid."

Shortly afterwards the parties were at arms' length and standing on their legal rights, and without loss of time the present action was commenced by issue of the writ on the 20th of December, 1904. At the close of the evidence for the defendants, plaintiff was recalled and gave the following additional evidence: "The correspondence carried on by or for the defendants caused me to believe, and I did believe, that the defendants would not object to the award by reason of its having been made late. I entertained that belief and acted on it; and since that award, and believing the defendants would not object to the award by reason of its having been late, I have parted with residue of cargoes Nos. 1 and 2."

"*Cross-examined.*—We took award as being good. I thought it absolutely legal."

It is certain that nothing was done, and no letter was written by the defendants themselves, so that this sixth finding cannot be supported by the acts or conduct of the defendants, and therefore it must be supported, if at all, by the acts and conduct of their brokers, Gellibrand, Heywood, & Co.

The letter, to which I have already adverted, clearly shows that Gellibrand, Heywood, & Co. contemplated the payment of the amount awarded, subject to the objection raised by them, and their objection, and only objection, was to the contention put

forward by plaintiffs that the whole amount was payable at once. Their view obviously was that payment should be made of so much of the amount awarded as was referable to each shipment according as the bills for each shipment fell due and were met. Beyond this they did not go.

The significance of the date of the award was never discussed, and was apparently never present, at this stage, to the minds of either plaintiffs or defendants' brokers. They, the brokers, never represented that this objection, going to the root of the award, was waived. But, further, I cannot find, on the whole of the correspondence, and on a consideration of the whole evidence, anything to support the contention that Gellibrand, Heywood, & Co. had authority, express or implied, on behalf of the defendants, to waive any objection to, or illegality in, the award. They were the sellers' London brokers, acting for them in making all arrangements for the arbitration and umpirage, but nothing more. But further, what is the meaning of the finding (sixth) that plaintiffs "believed and acted on the belief that defendants would not object to the award on the ground that it was made after the expiration of the time?" This rests on the single piece of evidence deposed to by plaintiff when recalled, that he, believing the award to be good, and not impeachable on the ground that it was made after the expiration of the time limit, sold off all that was left of the first two shipments. But when I examine the facts, I find that plaintiffs early in the history of the case, about July, 1904, asked for, and got leave, as to both shipments, to break bulk (under the terms of the contract if they had broken bulk without leave, no claim could be allowed) and from the first were selling off the timber by retail. This was their own deliberate act and course of business, begun before the award was made or any dispute arose, and continued after it, and in the same way exactly after the award and correspondence as before.

As regards this sixth finding, I hold:—(1) That Gellibrand, Heywood, & Co.'s letters and conduct, even if they had full authority to bind the defendants, had not the effect of waiving the time objection to the award; (2) that Gellibrand, Heywood, & Co. had in fact no authority to bind the defendants; and (3) that the plaintiffs were in no way prejudicially affected in

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their mode of dealing with the timber, the subject-matter of the contract, by anything said or done by the brokers. I can find nothing in the whole case rendering it inequitable, nothing amounting to fraud on the part of the defendants or their brokers, in relying on the objection founded on the date of the award: see judgment of Fry, J., in *Willmott* v. *Barber* (1).

The award has been attacked on other grounds, *i.e.*, that the umpire did not apportion the amount awarded over the two shipments, each of which was to be considered as a separate contract, and that he inspected the timber, and made his award without notice to defendants, and in the absence of anyone to represent them. I do not stop to consider these objections. I base my judgment on the grounds which I have already stated—that there was no valid award, and that by the contract a valid award was a condition precedent to the right to sue; and, accordingly, I hold that the verdict directed for the defendants should stand, and this motion should be refused with costs.

J. L.

Appeal. April 23, 24.

The plaintiffs appealed to the Court of Appeal (2).

Ronan, K.C., R. F. Harrison, K.C., and *Hanna,* for the appellants:—

[They contended that if the award was late, Buchanan, the defendants' arbitrator, was, on the evidence, responsible for the delay, and not the plaintiffs, and further that the defendants were estopped by the correspondence between the parties from relying on the lateness of the award. On this question they cited *Pickard* v. *Sears* (3) and *Freeman* v. *Cook* (4). On the question of the validity of the award in not distinguishing between the first two cargoes, they cited *In re Whitworth* v. *Hulse* (5) and *Ripley* v. *The Great Northern Railway Co.* (6).]

(1) 15 Ch. D. 96, at p. 105.
(2) In the Court of Appeal, before SIR SAMUEL WALKER, C., and FITZGIBBON and HOLMES, L. JJ.
(3) 6 A. & E. 469.
(4) 2 Ex. 654.
(5) L. R. 1 Ex. 251.
(6) 31 L. T. (N. S.) 869.

We contend that, in any event, the plaintiffs are entitled to judgment for the sum awarded by the jury.

No doubt, if we had here one indivisible contract, the true construction of which was that arbitration was to be a condition precedent to any right of action, the arbitration clause in the contract of 3rd March, 1904, would be a bar to this action. The contract, however, contains two independent and collateral arguments, one an unconditional warranty of the goods, and the other an agreement to refer.

The former contains no reference to arbitration: it is an independent covenant; there are intervening clauses between the two, and there is nothing to show that the intention of the parties was that arbitration was to be a condition precedent to an action on the warranty. If the former clause stood alone, it is clear an action for breach of it would lie; we contend that the arbitration clause only created a concurrent jurisdiction.

In *Dawson* v. *Fitzgerald* (1), Bramwell, B., in a dissenting judgment, said:—"If there be a covenant to pay in a certain event, and a separate and collateral covenant that in case of difference, that difference shall be referred to arbitration, the two are distinct from each other, and one may be broken, whether the other be broken or not, and it is no matter whether the two covenants are in different deeds, or in the same deed in different parts of it, or following each other consecutively. If, on the other hand, there is only a covenant to pay whatever by the arbitrators shall be found to be due, then no action can be maintained until the arbitration has taken place." This judgment was upheld on appeal (2). The judgment of Jessel, M.R., at p. 260, rules this case, which is not one "where the action can only be brought for the sum named by the arbitrator," or "when it is agreed that no action shall be brought till there has been an arbitration, or that the arbitration shall be a condition precedent to the right of action." On the contrary, we have here, first, a covenant as to quality, and, secondly, a covenant to refer, which covenants are, in the words of Jessel, M.R., "distinct and collateral," and "the plaintiffs may sue on the first, leaving the defendants to pursue one of two courses,

(1) L. R. 9 Ex. at p. 10. (2) 1 Ex. D. 257.

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either to bring an action for not referring, or to apply, under sect. 11 of the Common Law Procedure Act, 1854, to stay the action till there has been an arbitration."

Scott v. *Avery* (1) will be relied on by the other side; but the present case comes within the principle laid down in *Dawson* v. *Fitzgerald* (2), and not that in *Scott* v. *Avery* (1). We rely on *Horton* v. *Sayer* (3), where the principle of *Scott* v. *Avery* (1) is explained by Bramwell, B. The latter case, although heard by the House of Lords in 1856, had to be decided according to the state of the law in 1853, when the case came before the Exchequer, *i.e.* prior to the Common Law Procedure Act, which gave power to stay. Prior to that enactment the effect of holding an arbitration clause not to be a condition precedent was to reduce it to a nullity. See also judgment of Lord Campbell in *Roper* v. *Lendon* (4). *Elliott* v. *The Royal Exchange Assurance Co.* (5) is similarly distinguishable. The Court held that the covenant there in question was to pay loss or damage under a policy of fire insurance after the same had been adjusted, and that no independent cause of action lay. Here there is an absolute warranty of the goods.

Gorman v. *The Hand-in-Hand Insurance Co.* (6) is an authority in our favour.

The onus of showing that the plaintiffs have lost the ordinary right of action lies on the defendants, *per* Lord O'Hagan: *Mulkern* v. *Lord* (7).

[They also referred to *Viney* v. *Bignold* (8); *Hamlyn & Co.* v. *Talisker Distillery* (9); *Pompe* v. *Fuchs* (10); *Babbage* v. *Coulburn* (11); *Collins* v. *Locke* (12).]

Serjeant Dodd, K.C., *Henry, K.C.*, and *Megaw*, for the defendants:—

This contract must be construed as any other written document,

(1) 5 H. L. Cas. 811.
(2) L. R. 9 Ex. 10.
(3) 4 H. & N. 643.
(4) 1 Ell. & Ell. 825, at 830.
(5) L. R. 2 Ex. 237.
(6) I. R. 11 C. L. 224.
(7) 4 A. C. 182, at p. 193.
(8) 20 Q. B. D. 172.
(9) [1894] A. C. 202.
(10) 34 L. T. (N. S.) 800.
(11) 9 Q. B. D. 235.
(12) 4 A. C. 674.

so as to give effect, in the absence of ambiguous words, to the clearly expressed intention of the parties. It is one of a class of contracts common amongst traders in corn, timber, &c., where, owing to circumstances of convenience and distance, the parties have a clear object in providing a skilled tribunal, competent to dispose of the case in a short time. The contract cannot, as contended for by the plaintiffs, be divided into two separate and collateral covenants, but is one and indivisible. No doubt it contains a warranty that the goods shall be of fair average quality; but it is clear that payment must be made irrespective of any deficiency in the quality of the goods, the property in which passed on shipment. The ordinary right of a purchaser to refuse to accept delivery of the goods, or if sued for the price thereof to lodge money in Court, and rely on sect. 53 of the Sale of Goods Act, 1893, in diminution or extinction of the price, is expressly excluded under the terms of the contract. The plaintiffs were bound to take the goods, and if there was a deficiency in quality, they could only recover from the vendors such sum as the arbitrators awarded them.

Scott v. *Avery* (1) is a clear authority in our favour, as is *Elliott* v. *The Royal Exchange Assurance Company* (2). See also *Braunstein* v. *Accidental Death Insurance Company* (3), and *Edwards* v. *Aberayron Mutual Ship Insurance Society* (4). The contract between the parties cannot be distinguished from that in *Pompe* v. *Fuchs* (5), where Cockburn, C.J., said:—"It appears to me that there is here no separate agreement to refer to arbitration, but the whole contract must be read together. One term of the contract is that a fair allowance is to be made for inferior quality, but no complaint about quality is to be entertained, and no allowance to be made, unless the reference to arbitration, which is the remedy provided for the settlement of such a complaint, be demanded within fourteen days of the landing of the jute. This is not an unreasonable mode of determining a dispute about quality, and is a good answer to the action."

(1) 5 H. L. Cas. 811.
(2) L. R. 2 Ex. 237.
(3) 1 B. & S. 782.
(4) 1 Q. B. D. 563.
(5) 34 L. T. (N. S.) 800.

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Ronan, K.C., in reply.

SIR SAMUEL WALKER, C. :—

The principal question in this case is whether an arbitration and award on the quality of the timber and allowance, if any, to be made in respect thereof is, on the true construction of the contract, a condition precedent to a cause of action arising. Definite rules have been laid down in cases of the highest authority for the determination of the question ; but there is often a difficulty in applying them to the contract under consideration, and it is difficult to reconcile all the cases in which the rules have been applied, though the rules themselves are not questioned.

If there is contained in a contract, such as the present, first, an agreement to warrant, the breach of which gives, of course, a right of action, and, secondly, an agreement to refer, distinct from and collateral to the first, the right to sue for breach of warranty is not taken away, and the only remedy is to apply to stay the action under the provisions of the Common Law Procedure Act, or to bring an action for not referring, in which probably only nominal damages could be recovered. But if the agreement be to pay such damages for the breach of warranty as an arbitrator shall award, or that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action, no cause of action arises till the event has happened. It is not necessary that it should be an actually expressed term of the contract that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent. This result may be arrived at from the true construction of the contract as a whole; and in arriving at a conclusion as to the true construction, it is legitimate to consider all the circumstances under which the contract is made.

The case of *Dawson* v. *Fitzgerald* (1) is a strong illustration of the instances in which the right of action is not taken away. The ground was that there were two separate and independent covenants, and I do not see the general rule better stated than it is by the

(1) 1 Ex. D. 260.

Lord Chief Baron in *Gorman* v. *The Hand-in-Hand Insurance Company* (1). The case of *Edwards* v. *Aberayron Mutual Ship Insurance Society* (2) is a good illustration of the difficulties felt by judges in applying the admitted rules to a particular case, and Lord Esher, at p. 596, states the principle clearly when he says :— [His Lordship read from the words "The true limitation of *Scott* v. *Avery* (3)" to "administration of justice."].

Before I pass to the contract I shall refer to two cases in which it was held that arbitration was a condition precedent to a right of action. One is *Babbage* v. *Coulburn* (4), affirmed in the Court of Appeal. There was there an agreement to let a furnished house with garden to the defendant, and the defendant agreed to "keep and, at the expiration of his tenancy, to quit and deliver up quiet possession of the residence, garden, and grounds, with the furniture and effects, in accordance with the inventory, in as good order, state, and condition as the same are on his taking possession, and in the event of any loss, damage, or breakage, otherwise than provided for, the same to be made good or paid for by the tenant, the amount of such payment, if in dispute, to be referred to and settled by two valuers, one to be appointed by the landlord, and the other by the tenant, or their umpire, in the usual way." The Court held that a condition precedent to the right of action was created, distinguishing *Dawson* v. *Fitzgerald* (5), on the ground that there were not, as in that case, two separate and independent covenants.

The only other case I think it necessary to notice is *Pompe* v. *Fuchs* (6), which was a contract for the sale of jute shipped from Calcutta, guaranteed to be of average quality as hitherto imported, and there was a provision—[His Lordship read the provision]. The question was discussed whether *Dawson* v. *Fitzgerald* (5) applied, and it was held not. Cockburn, C.J., says : "It appears to me that there is here no separate agreement to refer to arbitration, but the whole contract must be read together. One term of the contract is that a fair allowance is to be made for inferior quality, but no complaint about quality is to be

(1) I. R. 11 C. L. at p. 233.
(2) 1 Q. B. D. 563.
(3) 5 H. L. Cas. 811.
(4) 9 Q. B. D. 235.
(5) 1 Ex. D. 260.
(6) 34 L. T. (N. S.) 800.

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entertained, and no allowance is to be made unless the reference to arbitration, which is the remedy provided for the settlement of such a complaint, be demanded within fourteen days of the landing of the jute. That is not an unreasonable mode of determining a dispute about quality, and is a good answer to the action."

Let me now apply those principles to the contract of 3rd March, 1904, made by foreign sellers of timber to Belfast merchants—[His Lordship read the contract].

The warranty is peculiar, for it has relation to shipment from port of loading. The payment must be made at once, and the property passes when the goods are put on board, and any claim must be made within seven days from discharge, and no claim is to be allowed if bulk broken, and the fact of difference arising does not entitle the buyers to reject the goods or refuse payment, but the difference is to be referred and the skilled domestic tribunal is to decide what allowance shall be made. The buyers could not refuse to pay, and they could not lodge deducting the amount of deficiency in quality. The only remedy is by way of allowance to be determined. The facts are extremely like those in *Pompe* v. *Fuchs* (1), and, indeed, the conditions in the present contract seem to me stronger to show that the cause of action preserved is the allowance to be ascertained as a step precedent.

Upon the whole, I am of opinion that the decision below on this point is right.

It has not been seriously contended that the award of the umpire was made in time, and, therefore, we must deal with the case as if there had been no award.

The other question, founded upon the answer of the jury to the sixth question left to them by the Lord Chief Baron, is, I think, sufficiently disposed of by the judgments in the King's Bench Division, especially that of Mr. Justice Wright. The general answer given by the plaintiff when he was recalled, that he believed the defendants would not object to the award as being late, and his acting upon that belief, has nothing in the correspon-

(1) 34 L. T. (N. S.) 800.

dence to support it; and further, I think the same correspondence shows the brokers had no authority, either in fact or as appearing from the correspondence, to bind the defendants. The letters show they felt they were bound to refer to their principals a matter of much less importance than the affecting of a vested right of theirs after the arbitration fell through, and I do not think the correspondence was addressed to such a matter.

Upon the whole, I am of opinion that the appeal fails, and must be dismissed with costs.

FITZGIBBON, L.J.:—

The questions whether, on the facts of this particular case, the award was valid, or the defendants were estopped from relying on its invalidity, or had waived their right to do so, did not appear to be very seriously argued here; and I have nothing to add to what has been already said upon that subject.

Upon the important question of the application of *Scott* v. *Avery* (1), I can only summarise the judgment of the Lord Chancellor.

Scott v. *Avery* (1) appears to share with *Allen* v. *Flood* (2) and *Derry* v. *Peek* (3) the peculiar fate that, though at first supposed to be novel in principle, and of wide application, it has in subsequent cases undergone a process of explanation and qualification resulting in the conclusion that it decided little or nothing new, and that its operation is strictly limited. Lord Campbell said that the decision of the House of Lords would not overturn or disturb any authority; and I read his judgment as laying down—as a general principle—no more than that it is lawful for parties to contract that no action shall be brought until arbitrators have decided, and that effect must be given to a contract which amounts to that.

For the purposes of the present case, it is to be observed that it follows from this principle that it is a good defence to an action on the consideration for a contract that it has been agreed that no right of action shall accrue until the arbitration has been carried to decision by *a valid award*.

(1) 5 H. L. Cas. 811. (2) [1898] A. C. 1. (3) 14 A. C. 337.

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Dawson v. *Fitzgerald* (1) is the only case to which I intend to refer specifically, because it is the authority on which the plaintiff's counsel have chiefly relied. Jessel, M.R., there tried to define the limits of the principle of *Scott* v. *Avery* (2) in logical form. He said that there were two cases where such a plea as the present was successful; first, where the action could only be brought for the sum named by the arbitrator; and, secondly, where it was agreed that no action should be brought till there had been an arbitration. By way of making his definition complete, he added that in *all other cases*, where there is first a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff can sue on the first, leaving the defendant either to bring an action for not referring, or to apply under the Common Law Procedure Act.

I can find no distinction, for the purpose of seeing whether it is operative or not, between a covenant to pay, and a warranty of quality, such as is contained in the contract now before us; the latter is a term of the contract just as distinct as a stipulation for payment of the price.

With all respect, it strikes me that the two cases put by Jessel, M.R., are really only a division into two parts of the one case covered by Lord Campbell's words. It equally follows that no right of action can accrue until there has been an arbitration, when (i) it is expressly agreed that no action shall be brought until there has been an arbitration — which is Jessel, M.R's second case—and when (ii) it is agreed that the only thing which can be sued for shall come into existence only as the product of an arbitration. In each case the question is whether the particular contract, on its true construction, sufficiently declares the common intention of both parties that the first proceeding to be taken to settle a dispute upon it is to be an arbitration.

This is in each case a pure question on the construction of a written document, whether the case lies on the one side or on the other of a definite *line* in the mathematical sense—a line without breadth—every case must lie on one side of that line or on the other,

(1) 1 Ex. D. 257. (2) 5 H. L. Cas. 811.

different cases may lie almost undistinguishably close to the line, but not on opposite sides of it, and "line balls" are barred. It is wandering into a wilderness to try to reconcile the various cases in which different instruments have been held to lie on the one side or the other; that observation equally applies to cases on the construction of wills, or of any other documents. No one case can rule another, unless both cases are identical.

It is agreed that, in construing any document, we must look at the whole document, examine its terms, its subject-matter, and all the circumstances which afford any indication of its meaning, *i. e.*, of the common understanding or intention of the parties. Nothing is to be left out of consideration that is within the four corners of the document, and, so long as we give effect to its words so far as they are unambiguous, we are to place ourselves, in the case of a contract, not in the arm-chair of a testator, but in the two chairs of the contracting parties, at opposite sides of the table where the contract was signed.

I cannot find any ground of distinction intelligible to merchants, between the contract in this case and that in *Pompe* v. *Fuchs* (1), on which the Court came to the same conclusion at which the Lord Chancellor and I have arrived in the present case, namely, that the bargain did not consist of collateral contracts, but of one indivisible bargain, by which both parties bound themselves, if any dispute should arise as to its fulfilment, to substitute an arbitration for the ordinary remedy of litigation; litigation being reserved for the enforcement of rights which had first been ascertained by arbitration, or for the enforcement of the right to arbitrate, or for the recovery of damages for the breach of the obligation to arbitrate.

The warranty that the goods were of fair average quality was only one—but the first and perhaps the most important—of a number of stipulations in the contract of sale, any one or more of which might lead to disputes and differences; *e.g.* the payment of the price, and the delivery or determination of the goods. The arbitration clause applies, "should *any* difference arise under this contract." A dispute as to the quality of the goods was

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clearly such a difference. That clause expressly disables the purchasers from exercising the two primary rights of ordinary purchasers.

> "The buyers shall not reject the goods, *if shipped*, nor refuse payment for same, *as above stipulated*."

The effect of the shipment is expressed in these words—

> "Property in goods to be deemed for all purposes, except retention of vendor's lien for unpaid price, to have passed to buyers when goods put on board."

The buyer, by signing this agreement, as soon as the goods were shipped in Canada became the owner of them, and contracted himself out of the right of rejecting the goods, and also out of the right to refuse payment "as above stipulated," *i.e.* by approved acceptances, or, at his option, in cash less 5 per cent. discount.

Serjeant Dodd, I think rightly, put in the forefront of his argument that the defendants could not avail themselves either of the remedies under the Sale of Goods Act, or of those under the Law Merchant. If sued for the price, unless they went to arbitration, they must have paid the full price, and brought a cross action or counterclaim. They were further bound by the following condition:—

> "No claim will be recognized by sellers upon any goods shipped under this contract, unless made within seven days from date of ship's final discharge, and no claim will be allowed upon any parcels broken into."

Having accepted these disabilities, interfering with their Common-Law rights, what did they get in return? The special remedy by arbitration—

> "Should any difference arise under this contract . . . such difference shall be referred to two arbitrators in the trade, having power to appoint an umpire, who shall decide *whether any, or what, allowance shall be made*."

Having empowered the arbitrators to decide that there shall be *no allowance*; or, if there is to be any allowance, to decide what that allowance shall be; in the case of property which has

already passed by shipment, and which the buyers can neither reject nor refuse to pay for, it seems to me to follow that they substituted an "allowance" to be fixed by the contractual tribunal for the remedy obtainable by the ordinary process of law, namely, the recovery of the price, or of damages for the subject-matter in dispute, by means of an action to be tried by a Civil Court. The only remedy is the decision of the domestic tribunal, which has power first to determine whether the party claiming is to have any remedy, and if so, then to give and measure that remedy in the shape of an "allowance."

It is only throwing dust into the preponderating scale to refer to arguments from convenience, from circumstances of time and distance, and the like. These only increase the likelihood that the parties intended that the procedure under the contract should take the place of the ordinary process of law, and that both should not be open at the same time—in short, that the agreement is one and indivisible, and does not comprise two "collateral contracts."

The circumstances of this case are at least as persuasive as those in *Pompe's Case* (1), and they seem to me to be far stronger than those which existed in any case which has been held to lie on the other side of the line. For this reason, I hold that these parties substituted a contractual forum for the Court of Common Law, and gave that forum exclusive jurisdiction, in the first instance, to hear and determine the dispute which arose between them. The plaintiffs can not have recourse to an action at law unless or until there has been either a breach of the contract to arbitrate, or a default in carrying out the arbitration, or a failure to comply with an award made under it. Therefore, in my opinion, the present action is not maintainable, and the appeal must be dismissed with costs.

HOLMES, L.J., concurred.

Solicitor for the plaintiffs: *William Alexander.*
Solicitor for the defendants: *R. T. Martin.*

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ARBITRATION CLAUSE—*Sale of goods—Contract—Construction—Valid award a condition precedent to action—Acquiescence—Laches—Estoppel by conduct.*] The plaintiffs, who carried on business in Belfast, contracted with the defendants, timber merchants in Canada, for the purchase of a quantity of timber, "warranted to be of fair average quality, of the sellers' usual shipment." The contract contained an arbitration clause, as follows: "Should any difference arise under this contract, the buyers shall not reject the goods, if shipped, nor refuse payment; . . . but such dispute shall be referred to two arbitrators in the trade . . . having power to appoint an umpire, who shall decide whether any, or what, allowance shall be made; the decision of such arbitrators or their umpire shall be final and binding on buyers and sellers, and this submission shall, and may, be made a rule of H. M. High Court of Justice." There were three shipments of cargo, the first two being, as the plaintiffs alleged, below contract quality; and this was so found by the jury, to whom the question was left for the purpose of assessing contingent damages. An arbitration was held in respect of

ARBITRATION CLAUSE—*continued.*
the two first shipments, which, it may be taken for the purposes of this report, resulted in an invalid award. In an action on the award, and for breach of warranty:—*Held*, on the construction of the contract, that a valid award was a condition precedent to enforcing liability under the warranty. The limits beyond which parties in such a case may, by acquiescence, laches, or conduct constituting an estoppel, preclude themselves from objecting to the validity of the award considered in the King's Bench Division. *Dawson* v. *Fitzgerald* (1 Ex. D. 257) considered and distinguished. *Gregg* v. *Fraser* [K. B. 545; App. 570

ARRANGING DEBTOR—*Refusal of debtor to sign composition notes—Contempt—Attachment.* *B.* presented a petition for arrangement, by which he proposed to pay his creditors 10*s.* in the £, in four instalments of 2*s.* 6*d.* each, the first of said instalments to be paid in cash within one month from the confirmation of the offer by the Court, and the other instalments of 2*s.* 6*d.* to be paid in three instalments at five, nine, and twelve months, respectively, from the acceptance of the proposal by the Court, to be secured by the joint and several promissory notes of the debtor and a surety. The offer was accepted and confirmed by the Court, by order dated the 27th March, 1906, and by the same order *B.* was ordered to lodge with the Official Assignees the money and composition notes before the 27th April. On the 13th March the surety signed a consent to perform the proposal, and the consent was made a rule of Court. *B.* failed to pay the 2*s.* 6*d.* in cash, owing to his inability to recover some debts that were due to him, and he refused to sign the composition notes. On the 29th May an order was made that *B.* should sign the notes, and as he still refused to do so, an order was made to attach him for his contempt. On the 29th May *B.* filed a petition for adjudication against himself. On the 1st June the petition was heard, and an order was made refusing to adjudicate *B.* bankrupt:—*Held* (reversing the decision of Boyd, J.), that once the debtor failed, through no culpable default of his own, to pay the first instalment in cash, the entire arrangement failed; that the debtor should not have been ordered to sign the composition notes; and that he should be adjudicated bankrupt. *Re M. & R.* (30 I. L. T. R. 137) considered. *In re Birt* - - App. 452

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COMPROMISE—*Probate—Practice—Citation to see proceedings—Minor (not a party) appearing at trial bound by result.*] An action was brought by the executors of a testator to establish a will against four of his next-of-kin. Two others, next-of-kin and legatees, one of whom was a minor, aged sixteen years, entered caveats, and were cited to see proceedings. They entered appearances, but the solicitor who entered the caveat and an appearance for the minor did not state in either that she was a minor. The remaining next-of-kin entered an appearance as an intervenient. At the trial a compromise was entered into with three of the defendants who withdrew their pleas in opposition to the will on terms, and the trial proceeded against the fourth defendant, who had served notice to cross-examine only, and resulted in a verdict and judgment for the plaintiffs, establishing the will. The cited parties were represented at the trial by counsel and solicitor, the minor did not apply for leave to intervene, and the action was allowed to proceed without objection. They made no application for a new trial, but brought an action against the executors to establish an earlier will, under which they would take somewhat larger legacies than under the will which had been established:—*Held*, on a motion by the

COMPROMISE—*continued.*
executors to stay the second action, that the plaintiffs were bound by the result of the first action, and that the second action must be stayed, and that the minority of one of the plaintiffs made no difference. *Mecredy* v. *Brown* K.B. PROB. 437; [APP. 445

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CONTRIBUTORY PLACE — *Local Government—Water supply—Sewage works—"Expenses incurred," meaning of—Area of charge—Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 5), *s.* 232 — *Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37)—*Powers of Local Government Board.*] The powers of the Local Government Board to fix the area of charge upon which special expenses shall be chargeable are not confined to cases in which the expenses have actually been incurred, but can be exercised in relation to future estimated expenses. By sealed order, reciting that the Rural District Council of *C.* had incurred, or were about to incur, special expenses, for the purpose of providing a water supply and drainage system, and maintaining the same, at the town of *B.*, in the said rural district, the Local Government Board determined that the two electoral divisions of *B.* urban and *B.* rural should be the area of charge, upon which all expenses incurred, or which might be incurred, by the council of the said rural district, should be chargeable. The works were mainly intended to benefit the town of *B.*, which was co-extensive with the electoral division of *B.* urban; but it was alleged by affidavit that benefits from the proposed works would also extend to the electoral division of *B.* rural, which surrounded the town of *B.* on every side—viz. the river, which received the sewage from the town, which was the principal source of water supply for portion of *B.* rural, would be purified; the pipe-line of the waterworks, which would run through a considerable portion of *B.*

CONTRIBUTORY PLACE—*continued.*
rural, could be tapped by the ratepayers; and it was proposed to establish a fountain at certain cross-roads for the use of the inhabitants of *B.* rural:—*Held*, that the electoral divisions of *B.* urban and *B.* rural, being contributory places within the meaning of section 232 of the Public Health Act, 1878, were places which the Local Government Board was entitled to fix as the area of charge. *The King* (*Potts*) v. *Local Government Board* - - - - - - APP. 206

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CORPORATION—*Person*—5 & 6 *Vict. c* 106, *s.* 80.] A corporation is a "person" within the meaning of 5 & 6 Vict. c. 106, s. 80. *The King* (*King*) v. *Chairman and Justices of Antrim* [K.B. 298

COSTS—*Apportionment—Separate causes of action—Less than £50 recovered—Expenses of witnesses—Third counsel—Instructions and perusals—Gen. Ord. LXV., R.* 65 (41), (42.)] In an action brought to recover £414 15*s.* 6*d.*, for work and labour done under three separate contracts, all of which related to the execution of the same undertaking, the defendant pleaded that he had contracted as agent for a disclosed principal; that the work had not been executed in a proper manner; and that the plaintiff agreed to execute each of the three contracts for a bulk sum, in the total less than the amount sued for. The jury found that the defendant had contracted personally in the first contract, but had contracted as agent for a disclosed principal in the second and third contracts. They also found, by one and the same finding, that the work done under all three contracts had been executed in a proper and workmanlike manner, and found against the defendant on the issues as to the price of the works. Judgment was entered for the plaintiffs for £37 18*s.* 8*d.*, with costs upon the first contract, and judgment was entered for the defendant with costs upon the second and third contracts. *Held*, on taxation of the costs of the action, reversing the decision of the King's Bench Division, that the plaintiffs should be allowed only such proportion of their costs as related to the cause of action upon which they had succeeded, and that they should not be allowed, in addition, the cost of issues found in their favour by the jury in respect of those causes of action on which judgment with costs had been entered for the defendant. *Held*, further, that plaintiffs having recovered less than £50, G. O. LXV., R. 65 (41), applied, and that the plaintiffs were not entitled to the costs of a third counsel, notwithstanding the fact that the jury had found in their favour certain issues relating to the causes of action on which judgment had been entered for the

COSTS—*continued.*
defendant; but that the defendant was entitled to the costs of a third counsel, inasmuch as the sum sued for exceeded £50. G. O. LXV., R. 65 (42), only applied to a plaintiff's costs. *Henderson* v. *M'Tear* - - - - - - - App. 526

2. —— *Probate—Practice—Special order, allowing unsuccessful defendant in Probate suit his costs out of the estate—Judicature Act* (*Ireland*), 1877, *sect.* 53.] Where, in a Probate suit, tried before a Judge and jury, the Judge at the trial made a special order, allowing the unsuccessful defendant, who had pleaded undue influence on the part of the plaintiff, his costs out of the estate:—*Held*, that, provided there are any grounds on which the Judge can base such special order, there is no jurisdiction to interfere with an order so made in exercise of his discretion. Probate suits are on a special footing in this respect. *Cummins* v. *Murray* - - - - - - K. B. 509

3. —— *Trial by Judge without jury—Trivial action—Successful plaintiff ordered to pay costs—Discretion of Judge—Supreme Court of Judicature Act* (*Ireland*), 1877 (40 & 41 *Vict. c.* 57), *ss.* 52, 53.] The plaintiff brought an action against the defendant, his tenant under a yearly tenancy, for breaches of agreement to keep the demised premises in repair, claiming £30 damages. The defendant in her defence, in addition to traversing the alleged breaches, denied the alleged agreement, denied that she had ever been tenant of plaintiff, and further alleged that the tenancy had been determined by notice to quit before the matters complained of. The action was tried by a Judge without a jury, and at the trial the plaintiff's own estimate of his loss was from £5 to £6. The Judge assessed the damages at £1. He gave judgment for the plaintiff for that amount, with such costs as a decree for £1 would carry in the County Court, and made an order that the plaintiff should pay the defendant's costs of the action less £1 damages and such civil-bill costs as above mentioned, on the ground, as alleged in the order, that the action should have been brought in the Civil-bill Court and was quite unfit to be tried in the Superior Courts. The Judge, in his report, further stated that he was of opinion that the action was one of the most trivial and insignificant that could possibly be brought; that the plaintiff's own estimate of his loss was grossly exaggerated; that he considered it wrong and an abuse to bring such an action in the Superior Courts; and that the plaintiff should pay the penalty of the extra costs thereby occasioned. The plaintiff having moved to have the order varied by directing the defendant to pay plaintiff half his costs of the action, and directing defendant to bear her own costs thereof:—*Held*, in the King's Bench Division, by Lord O'Brien, L.C.J., and Boyd, J. (Johnson and Gibson, JJ., *diss.*), and *held*, by the Court of Appeal, that there were materials before the Judge at the trial sufficient to justify him in exercising his discretion of ordering the plaintiff to pay the defendant's costs, and that his order in this respect was not subject to review. *Whitmore* v. *O'Reilly* [K. B. 357; App. 392

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—— Reversal on appeal—Order of Quarter Sessions—Sufficiency of adjudication 164
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EQUITABLE ASSIGNMENT — Receiver — Priority - - - - - 215
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EMPLOYER—Truck Acts—Bonus for full time —Weekly wages - - - 405
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ESTATE DUTY—*Revenue—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *sect.* 5, *sub-sect.* 3—*Interest in possession—Conveyancing form.*] Where, under a settlement, *H.* took a vested legal estate as tenant in common in fee, with a limitation over on his dying under twenty-one, subject to a proviso that during his minority trustees were to enter into receipt of the rents, providing thereout for his maintenance, &c., and to accumulate the surplus upon trust, if he should attain his age, for him; but if he should die under age, for the persons who should ultimately become indefeasibly entitled; and *H.* dying under age, the defendants became indefeasibly entitled as tenants in common in fee of all the lands in the settlement, including *H.*'s share. *Held*, that estate duty was not payable as on a property passing on *H.*'s death; that *H.*'s interest had not become a beneficial interest in possession in the lands at his death; and that, accordingly, section 5, sub-section 3, of the Finance Act, 1894, was applicable. *Held*, also, that the real nature of the transaction must be considered, and not only the conveyancing form. *Semble:* That estate duty might be payable on the actual sums received by *H.* for maintenance, upon the analogy of the provision with regard to legacy duty, under 36 Geo. 3, c. 52, s. 11, and 54 Geo. 3, c. 92, s. 12 (Ir.). *Attorney-General* v. *Power* [K.B. 272

ESTATE DUTY—*continued.*

2. —— *Revenue—Settlement—Gift* inter vivos—*Interest retained by settlor—Customs and Inland Revenue Acts*—1881 (44 & 45 *Vict. c.* 12), *section* 38 (2), *as amended by the Customs and Inland Revenue Act*, 1889 (52 *Vict. c.* 7), *section* 11, *and the Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *section* 2 (c).] By a settlement, dated the 4th September, 1902, *C.* conveyed to trustees a sum of £15,000 invested on mortgage upon trust to pay out of the income a sum of £575 to his daughter Mrs. D. for life, and after her death, as to the said sum of £15,000, in trust for such child or children as Mrs. *D.* should appoint; and in default of appointment for the children equally, who, being sons, should attain twenty-one, or, being daughters, should attain twenty-one or marry. There was a power to Mrs. *D.* to appoint to her husband an annuity of £300 a year for his life, in the event of his surviving his wife. If there should be no child who, being a son, should attain twenty-one, or a daughter attain that age or marry, the trustees were to hold the trust funds after the death of Mrs. *D.* (but subject to the annuity to the husband) in trust for *C.* absolutely. The trustees, during the life of Mrs. *D.*, were to hold the balance of the income produced by the £15,000 after payment of the annuity of £575 to Mrs. *D.* (or the annuity to the husband), upon trust for *C.* absolutely. The mortgage on which the £15,000 was invested produced £675 per annum. *C.* died on September 11th, 1904:—*Held* (affirming the judgment of the King's Bench Division), that neither the trust for *C.* of the surplus income, after payment to Mrs. *D.* of the annuity of £575, nor the ultimate contingent trust for *C.* of the *corpus* of the fund, rendered the gift one "of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise," within the meaning of clause (a) of the Customs and Inland Revenue Act, 1881, s. 38 (2), as amended by sect. 11 of the Customs and Inland Revenue Act, 1889, and the Finance Act, 1894, s. 2, clause (c), and that neither estate duty nor "settlement estate duty" was payable by the executors of *C.* in respect of such part of the £15,000 as was settled on Mrs. *D.*, her husband, and issue. *In re Cochrane* APP. 200

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FISHERY ACTS—*Deleterious matter—Dilution in river—Point at which deleterious character of matter placed in river is to be ascertained*—5 & 6 *Vict. c.* 106, *s.* 80.] *F. & H., Ltd.*, a firm of millowners at *H.*, were prosecuted for having caused deleterious or poisonous liquid to flow from their works into the river *M.*, in breach of 5 & 6 Vict. c. 106, section 80. The case was dismissed by the magistrates before whom it was originally heard, and, on appeal to Quarter Sessions, it was heard by the Chairman alone, who came to the conclusion on the facts that the matter, although highly deleterious to fish when discharged into the river, became, at the instant of its getting into the river, so largely diluted as to cease to be deleterious. Holding that the point at which it was to be determined whether the discharge was deleterious or not, under the section, was immediately after it entered the waters of the river, he dismissed the summons, but subject to a case stated for the opinion of the King's Bench Division. The order of the Chairman of Quarter Sessions, incorporating the case stated, was brought up by writ of *certiorari*, and the sufficiency of the reasons set out in the case stated as justification for the order of acquittal was discussed:—*Held*, by Lord O'Brien, L.C.J., Palles, C.B., and Gibson, J. (Madden and Wright, JJ., *diss.*), that the time at which the deleterious character of the matter was to be ascertained was at the moment it entered the river; that the effect of the action of the river upon it was immaterial, and that, accordingly, the grounds set out in the case stated as a justification for the acquittal were bad in law. *The King* (*King*) v. *Chairman and Justices of Antrim* [K.B. 298

2.—— *Draft-net—License for—Eels—Tender of maximum amount for license*—11 & 12 *Vict. c.* 92, *s.* 21.] Draft-nets for eels are amongst the

FISHERY ACTS—*continued.*
engines mentioned in the schedule to 11 & 12 Vict. c. 92, and the Conservators of Fisheries are bound to issue licenses for such nets to any persons requiring the same on tender of the maximum amount charged therefor; and it is not necessary that the provisions of sect. 21 of the Act should be put in force before such licenses should be issued. A Board of Conservators passed a resolution fixing the duty for "an eel draft-net," but limiting the time and place within which such should be used. The Department of Agriculture subsequently settled a form of license for "a draft-net for eels" without such restrictions, under sect. 28 of the Act:—*Held* (reversing the decision of the majority of the King's Bench, but affirming the judgment of Lord O'Brien, L.C.J.), that the Conservators were bound to sell a license for a draft-net for eels to any person requiring the same on tender of the maximum charge therefor mentioned in the schedule to the Fishery Act of 1848. *The King* (*Johnston*) v. *Coleraine Fishery Conservators* - - - - K.B. 219; App. 244
—— "Person"—5 & 6 Vict. c. 106, s. 80 298
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GENERAL DEALER—3 *Edw.* 7, *c.* 44, *section* 2—*Application to dealings in articles other than those enumerated in sect.* 12.] Sect. 2 of the General Dealers (Ireland) Act, 1903, requires every general dealer to enter in a book the particulars of each transaction in his business, including certain particulars as to each article purchased by him, in default whereof he is liable to a penalty. Section 12 defines general dealer as meaning any person buying or selling certain specified articles, whether such person deals in those articles only, or together with second-hand goods or marine stores. The defendant, a licensed general dealer, had in his possession a quantity of horsehair, the particulars of the purchase of which he had not entered in his book. Horsehair is not one of the articles specified in section 12:—*Held*, that the defendant was not guilty of an offence under section 2. *Quære*: Is a dealing in second-hand goods or marine stores, not consisting of any of the articles specifically enumerated in section 12, subject to the provisions of the Act? *Kelly, Appellant*; *Rice, Respondent* - - K.B. 1

2.—— 3 *Edw.* 7, *c.* 44, *s.* 1—*Contravention of terms of license—Dealings in public street—Dealings outside district for which licensed.*] The respondent was licensed under the General Dealers (Ireland) Act, 1903, to carry on the business of a general dealer on certain premises within the Metropolitan Police district of Dublin. He went about from house to house with a pony and cart at Howth (which is outside the metropolitan district), buying bottles and old metal (which are among the articles specified in section 12 of the Act:—

GENERAL DEALER—*continued.*
Held, that the respondent had not contravened the terms of his license, and was not guilty of any offence under the General Dealers (Ireland) Act, 1903. *Quære*: Could a license be so framed under the Act as to confine the licensee's dealings to the district in which he is licensed? *Hall, Appellant*; *O'Brien, Respondent* - - - - K. B. 6

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GUARDIAN OF THE POOR—Contract with Board—Debt for seed potatoes—Disqualification - - - - - - 173
See POOR LAW.

HARBOUR CONSTABLE—*Maximum salary—Collector of tolls and rates—Additional remuneration*—16 & 17 *Vict. c.* 136, *ss.* 7, 9.] Where a harbour constable, appointed at the maximum salary under 16 & 17 Vict. c. 136, is also appointed collector of harbour tolls and rates, the duties of the two offices are distinct, and it is lawful for the County Council, by resolution, to authorise the harbour constable to retain a commission on tolls and rates as remuneration for his services as such collector. *County Council of Kerry* v. *O'Connor* [K. B. 458

HORSEHAIR—General dealer—3 Edw. 7, c. 44, *ss.* 2, 12 - - - - - - 1
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HOTEL—Licensing Act, 1902, s. 2, sub-s. 2—Sale to public—Public bar - - 94
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INDUSTRIAL SOCIETY—*Alteration of rules—Validity of alteration—Conclusiveness of acknowledgment of registry—Power of Society to alter rights of their servants—Industrial and Provident Societies Act*, 1893 (56 & 57 *Vict. c.* 39), *sect.* 10, *sub-sect.* 3.] The plaintiff was elected general manager, at a weekly salary, of the defendant Society, a society registered under the Industrial and Provident Societies Act, 1893. At the time of his election a fundamental rule of the Society was that the manager could not be dismissed except by a two-thirds majority at a special general meeting; and, by another rule of the Society, fundamental rules could not be altered except by a two-thirds majority at a special meeting. Subsequently to plaintiff's election it was resolved, at a meeting of the committee of the Society, that the rule as to the dismissal of the manager should be amended so as to give the committee power to dismiss the manager, and notice of this amendment was given to the Registrar of Friendly Societies, who issued to the Society an acknowledgment of the registry of the amendment, as provided by sect. 10, sub-

INDUSTRIAL SOCIETY—*continued.*
sect. 3, of the Act. The committee subsequently resolved to dismiss the plaintiff, and gave him one week's notice of dismissal. The plaintiff, when elected manager, was generally aware of the rules, and knew that he could be dismissed only by a two-thirds majority at a special general meeting. He had no knowledge of the amendment in the rule until after his dismissal:—*Held*, by the King's Bench Division and by the Court of Appeal, that the acknowledgment of registry by the registrar was conclusive as to the validity of the amendment. *Rosenberg* v. *Northumberland Building Society* (22 Q. B. D. 373) followed and applied. *Held*, also, by the King's Bench Division (Lord O'Brien, L.C.J., and Gibson, J.; Andrews, J., *diss.*) and by the Court of Appeal, that the amendment was binding on the plaintiff so as to render his dismissal valid. *Butler* v. *Springmount Dairy Society* - - - K. B. 193; APP. 200

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—— King's Bench Division—Review of previous decision - - - - - - 487
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—— Urban District Council—Road—Consent to breaking up - - - - - 487
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JURY—Trial without—Discretion of Judge as to costs - - - - - 357, 392
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JUSTICES—*Order—Appeal—Petty Sessions District in two Quarter Sessions Divisions—Dismiss on the merits—Reversal on appeal—No express adjudication of guilt*—5 & 6 *Vict. c.* 106, *s.* 78—14 & 15 *Vict. c.* 93, *s.* 24—40 & 41 *Vict. c.* 56, *s.* 74.] Where a Petty Sessions District is in two Quarter Sessions Divisions, the Quarter Sessions Division in which the Petty Sessions Courthouse is situate is the Division to which an appeal should be taken, under sect. 24 of the Petty Sessions

JUSTICES—*continued.*
Act, 1851, notwithstanding that the offence was committed in the other Quarter Sessions Division. On appeal to Quarter Sessions from an order dismissing a complaint on the merits, the order of the Chairman and Justices was—"that the dismiss on the merits be reversed," and that a certain fine and costs should be paid by the defendant:—*Held*, that although the Quarter Sessions did not in express words adjudicate the defendant guilty of the offence, the order was good as an adjudication of guilt, under sect. 24 (6) of the Petty Sessions Act, 1851. *The King* (*Conway*) v. *Justices of County Tyrone* - K. B. 164

—— Bias—Order voidable not void—Acquittal—Certiorari - - - - - 499
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—— Certificate—Wholesale beer dealer's license—Incorporated Company - 415, 430
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—— Name and address of owner of cart—Irish letters - - - - - 181
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LAND LAW (IRELAND) ACTS—*Landlord and tenant—Lease—Covenant to pay rent—Fair rent order—Yearly tenancy—Arrears of rent—Specialty debt—Appropriation—Land Law* (*Ireland*) *Act*, 1881, *sect.* 21—*Land Law* (*Ireland*) *Act*, 1887, *sect.* 1—*Land Law* (*Ireland*) *Act*, 1896, *sect.* 16.] 1. Where, under the provisions of sect. 1 of the Land Law (Ireland) Act, 1887, a lessee is deemed to be tenant of a present tenancy in like manner and subject to like conditions as if his lease had expired, and a fair rent is fixed in respect of such tenancy, the landlord cannot sue in covenant for arrears of rent ascertained by the fair rent order accruing after the lease is deemed to have expired. 2. The sum of two years' rent, payment or lodgment of which is prescribed by section 16 of the Land Law (Ireland) Act, 1896, in order to entitle a tenant to redeem when the rent in arrear exceeds two years' rent, refers to the two years' rent last due, and the landlord cannot appropriate such payment or lodgment towards earlier arrears of rent. *Quære*, whether from such payment or lodgment a promise to pay arrears can be inferred. *Carrickfergus Urban District Council* v. *Martin*. - - - K. B. 79

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LICENSE—Draft-net for eels—Tender of maximum duty - - - 219, 244
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—— General dealer - - - - - 6
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LICENSING ACTS—*Brewer of beer for sale—Wholesale beer-dealer's license—Certificate—Incorporated Company—Right to obtain license—Residence of Company*—27 & 28 *Vict. c.* 35, *ss.* 3, 4—37 & 38 *Vict. c.* 69, *ss.* 8, 37—Certiorari.] A Company of brewers, incorporated under the Companies Acts, brewed beer in the city of Cork, and had a depot for the supply of it in Macroom, for which they held a wholesale beer-dealer's license. Having built new premises in Macroom, they applied for and obtained in the name of the Company, at the Licensing Sessions at Macroom, a certificate for a wholesale beer-dealer's license for such new premises. Twenty-one days' notice of the application had been given to the District Inspector of Constabulary of Macroom district. On an application by the District Inspector for a writ of *certiorari* to quash the order granting the certificate, on the grounds that such license could not be held by an incorporated Company; that the Company had not a residence in Macroom; and that notice of the application should have been served, not on the District Inspector of Macroom, but on the District Inspector of the district in which the Company resided:—*Held*, by the King's Bench Division, that an incorporated Company was capable of holding such license, and of obtaining a certificate for the same in its own name; that the Company had a residence in Macroom; and that service of notice of the application on the District Inspector of Macroom was sufficient. *Held*, by the Court of Appeal that sect. 8 of the Licensing Act, 1874, does not apply to brewers, and that the certificate was unnecessary and valueless. *Certiorari* refused. *The King* (*Cottingham*) v. *Justices of County Cork* K. B., 415; App. 430

LICENSING ACTS—*continued.*

2.——*Licensing* (*Ireland*) *Act*, 1902 (2 *Edw.* 7, *c.* 18), *sect.* 2, *sub-sect.* 2. *Hotel Right of sale to the public*—"*Public bar.*"] The authority to sell intoxicating liquors conferred by a license, under sect. 2, sub-sect. 2, of the Licensing Act, 1902, is not the same as that which belonged, before the Act, to an hotel license issued under the provisions of the Inland Revenue Act, 1880. Unless the house has, and continues to have, no "public bar," and answers, and continues to answer, the other descriptions of an hotel contained in the section, the license is no protection to the holder during its currency. With respect to such a license, where the house answers the description specified, there is no prohibition against sales to the general public—that is to say, to persons who are neither travellers nor lodgers in the house. The meaning of the expression "public bar" considered. *Quinn* v. *Burke* - - K.B. 94

3. —— *Licensing* (*Ireland*) *Act*, 1902 (2 *Edw.* 7, *c.* 18), *sect.* 3—"*Lease*"—"*Expiration*"—*Parol contract of tenancy from year to year determined by notice to quit.*] The determination by notice to quit of a contract of tenancy from year to year created by parol is an "expiration of a lease" within section 3 of the Licensing (Ireland) Act, 1902. *The King* (*Wright*) v. *Chairman and Justices of the County of Cork* - K. B. 349

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—— Vaccination—Station—Dispensary district—Medical officer—Report—Fees - 333
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MASTER AND SERVANT — Contract of employment—Weekly wage—Bonus for full-time work—Failure to put in full time—Truck Acts - - - 405
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—— Duty of shipowners to seamen - 12, 52
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—— Industrial Society—Alteration in rules 193, [200
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—— Seduction—Evidence of service 254, 260
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MEDICAL OFFICER—Vaccination—Re vaccination—Fees — Operations performed outside dispensary district, and vaccination station - - - - 333
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NAME—*Cart—Name and residence of owner painted in Irish letters—Summary Jurisdiction* (*Ireland*) *Act*, 1851 (14 *& 15 Vict. c.* 92), *section* 12, *sub-section* 1.] Section 12, sub-section 1, of the Summary Jurisdiction (Ireland) Act, 1851, imposes a penalty on the owner of a cart, &c., who uses it on a public road without having his name and residence painted upon some conspicuous part of the off-side in legible letters of the dimensions and colour therein mentioned:—*Held*, that, on the true construction of the sub-section, the "legible letters" therein referred to are such legible English letters as are now in use, and that the provision is not complied with by painting the name and residence of the owner on the cart in Irish letters. *M'Bride*, *Appellant*; *M'Govern*, *Respondent* - - K. B. 181

NEGLIGENCE — Contributory — Pleading — Particulars - - - - 120
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—— Loading cargo—Maize in bulk—List—Proceeding on voyage notwithstanding 12, [52
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ORDER—Quarter Sessions—Reversal of dismiss—Sufficiency of adjudication - 164
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ORDERS GENERAL—1905 (22nd February), XIX., Rr. 6, 7 - - - 120
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—— LXV., R. 65 (41), (42) - - 526
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—— 1898 (22nd December), Application of Enactments, art. 12 - - - - 173
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PAROCHIAL HOUSE—Rooms used (*a*) as private chapel. (*b*) for keeping parish registers - - - - 479
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PARTICULARS—*Practice—Contributory negligence—Inevitable accident—G. O. XIX., Rr.* 6, 7.] Where, in an action for negligence, the defendants pleaded in general terms inevitable accident and contributory negligence, the Court ordered particulars. *Martin* v. *M'Taggart* - K.B. 120

PERPETUITY — Immediate and derivative—Purchase of fee—Variation of rent 465
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PETTY SESSIONS DISTRICT — In two Quarter Sessions Divisions—Appeal 164
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PLEADING—Contributory negligence—Inevitable accident—General terms - 120
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POLICY OF INSURANCE — Payment of premiums by person other than the insured—Marriage settlement—Succession duty - - - - - - 122
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POLLUTION—River — Dilution of deleterious matter - - - - - - 298
See Fishery Acts. 1.

POOR LAW—*Local Government—Board of guardians—Seed potatoes—Guardian concerned in contract for repayment—Disqualification—Schedule to Local Government (Application of Enactments) Order*, 1898, *art.* 12—*Seed Supply Act*, 1898, 61 & 62 *Vict. c.* 50.] A poor law guardian, who, in common with the other occupiers under a certain valuation, receives seed potatoes from the guardians under a promise to pay for them a specified price, is, so long as the price remains unpaid, concerned in a contract with the guardians, within the meaning of article 12 (4 e) of the Schedule to the Privy Council (Application of Enactments) Order of the 22nd December, 1898. *The King* (*Madden*) v. *Justices of County Roscommon* - - - - - - K. B. 173

—— Rates — Exemption — Charitable purposes
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PRACTICE—Appeal—Quarter Sessions—Petty Sessions district in two divisions - 164
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—— Certiorari.
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—— Contempt—Arranging debtor - - 452
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—— Costs.
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——Particulars—Contributory negligence—Inevitable accident - - - 120
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——— Probate suit—Cited parties—Appearance at trials—Compromise - - 437, 445
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—— Probate suit—Costs out of the estate—Unsuccessful defendant—Special order - 509
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—— Receiver — Order appointing — Equitable assignment - - - - - 215
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—— Review of previous decision - - 487
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PREMIUMS—Payment by person other than the insured — Marriage settlement — Succession - - - - - - 122
See Succession Duty.

PRESENT TENANT—Lessee—Arrears of rent recoverable - - - - - 79
See Land Law (Ireland) Acts.

PREVIOUS DECISION—*Reviewing—Practice.*] The King's Bench Division, in a case in which there is no appeal, has power to review, and to refuse to follow, a previous decision of the Court; but before doing so, a Court will be constituted, to which each member will be summoned, in order that he may have an opportunity of attending. *The King* (*Collins*) v. *Justices of County Cork* [K. B. 487

PRIORITY—Assignment of chose in action—Appointment of receiver - 215
See Receiver.

PROBATE SUIT—Costs out of the estate—Judicature Act, 1877, s. 53 - 509
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PROFITS—Received out of lands—Sandpits—Valuation—Rates - - 473
See Sandpits.

PUBLICHOUSE—Expiration of lease—Notice to quit—Yearly tenancy - - 349
See Licensing Acts. 3.

QUARTER SESSIONS—*Acquittal subject to case stated—Speaking order—Certiorari—Power to remit to Quarter Sessions.*] When a Court of Quarter Sessions acquits a defendant, and makes the acquittal subject to a case stated, wherein the reasons on which the Quarter Sessions acted are set forth, and such acquittal is brought up into the King's Bench Division by writ of *certiorari*, there is jurisdiction, under the Common Law, in the King's Bench Division to inquire into the sufficiency of the reasons so set forth, and if such reasons be found insufficient, the King's Bench Division will quash the order of Quarter Sessions. But the jurisdiction of the King's Bench Division in Ireland is confined to affirming or quashing the order of Quarter Sessions. There is no jurisdiction analogous to that which prevails in England under the Supreme Court of Judicature Act, 1894, section 2, to remit the order with the opinion and direction of the Court for rehearing and determination of the Court of Quarter Sessions. *The King* (*King*) v. *Chairman and Justices of Co. Antrim* K. B. 298

QUARTER SESSIONS—*continued.*

2.——Certiorari—*Affirmance of conviction at Petty Sessions—Unspeaking order—Trespass in pursuit of game.*] Where, on appeal from a conviction at Petty Sessions for trespass in pursuit of game, the Chairman and Justices at Quarter Sessions simply affirmed the conviction with costs:—*Held*, that *certiorari* would not lie to bring up to be quashed the order of Quarter Sessions. Jurisdiction of the King's Bench Division over an appellate order of Quarter Sessions, which neither recites the evidence on which it is founded nor states a case, considered. *The Overseers of Walsall* v. *London & North-Western Railway Co.* (4 A. C. 30) applied. *The King* (*Burke*) v. *Chairman and Justices of Galway* - - - - - - K. B. 446

—— Petty Sessions district in two divisions—Appeal - - - - - - 164
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—— Voidable order—Bias—Acquittal—Certiorari
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RATES—*Valuation Acts—Poor rate—Exemption—Hereditaments used exclusively for charitable purposes—Parochial house used as residence for parish priest—Private chapel—Room used for keeping parish registers*—15 & 16 Vict. *c.* 63, *s.* 16—17 *Vict. c.* 8, *s.* 2.] A house built by parishioners for, and used by a Roman Catholic parish priest as, a residence and for parochial purposes, is not exclusively used for charitable purposes so as to be exempt from assessment for poor rate. Nor is a room in such house, used solely as a private chapel for the occupants of the house, so exempt. Nor a room used for keeping the parish registers and things connected with the ministration of the office of parish priest, unless exclusively so used. *Commissioner of Valuation, Appellant; O'Connell, Respondent* - - - - - K. B. 479

—— Sandpits—Profits received out of land 473
See SANDPITS.

RECEIVER—*Assignment of chose in action—Receiver by way of equitable execution appointed before notice of assignment served—Priorities—Supreme Court of Judicature Act* (*Ireland*), 1877, *s.* 28, *sub-s.* 6—*Interpleader—Costs.*] An assignee for value of a debt has priority over a person who subsequently obtains an order appointing him receiver by way of equitable execution over such debt, although the order was obtained before notice of the assignment was given by the assignee to the debtor. *In re Bristow* [K. B. 215

REDEMPTION—Agricultural tenancy—Arrears of rent lodged—Appropriation - 79
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REGISTRATION—Alteration of Society's rules—Acknowledgment by Registrar 193, 200
See INDUSTRIAL SOCIETY.

RENT—*In advance—Contract—Telephone—Disconnexion—Right to the full rent.*] *G.* agreed to pay to the National Telephone Company rent in advance for the use of a telephone. The Company was to have the right to "disconnect" *G.*, without prejudice to the other conditions of the contract, if he failed to observe the Company's rules, or if any sum of money payable by him under the contract was in arrear. Furthermore, the contract was terminable by the Company in the event of any sum payable under it being in arrear. *G.* paid the first year's rent in advance; but, upon the second falling due, he declined to pay in advance for the future. Thereupon the Company disconnected *G.*, and claimed to be entitled to recover the full rent payable on the first day of the second year, although he had in fact enjoyed the use of the telephone during forty days of the second year, and no more:—*Held*, that the Telephone Company was entitled to recover the second year's rent in full. *National Telephone Co.* v. *Griffen* - - K. B. 115

—— Arrears recoverable—Lessee becoming present tenant—Fair rent order - 79
See LAND LAW (IRELAND) ACTS.

—— Lodged for redemption—Agricultural tenancy—Appropriation - - - - 79
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—— Variable—Sub-perpetuity - - 465
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RESIDENCE—Incorporated Company—Carrying on business in several places—Wholesale beer-dealer's license - 415, 430
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—— Owner of cart—Irish letters - - 181
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REVENUE—Estate duty—Gift *inter vivos* 200
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—— Estate duty—Interest in possession - 272
See ESTATE DUTY. 1.

—— Succession duty—Predecessor - 122
See SUCCESSION DUTY.

RIVER—Deleterious matter—Dilution—5 & 6 Vict. c. 106, s. 80 - - - 298
See FISHERY ACTS. 1.

ROAD—*Summary Jurisdiction* (*Ireland*) *Act*, 1851 (14 & 15 *Vict. c.* 92), *s.* 9, *sub-s.* 3—*Breaking up road—Jurisdiction over road transferred to Urban District Council—Persons to give consent to breaking up road—Local Government Board* (*Ireland*) *Provisional Order Confirmation* (*Fermoy*) *Act*, 1886 (49 & 50 *Vict. c. lv*), *s.* 1.] By sect. 9, sub-sect. 3, 14 & 15 Vict. c. 92, any person breaking up the surface of a road, or committing any of the other acts specified therein, "unless with the consent of the county surveyor, or by the authority of any presentment," is liable

ROAD—*continued.*
to the fine therein mentioned:—*Held*, that in the case of a road, the jurisdiction, power, and authority over which has been transferred from the Grand Jury to an Urban District Council, the sub-section still applies, subject to the variation that the consent is to be given by the Urban District Council, or their authorized officer. *Dundalk Town Commissioners* v. *Dundalk Gas Co.* (20 I. L. T. R. 81) considered. *The King (Collins)* v. *Justices of Co. Cork* - - K. B. 487

RULES—Industrial society—Alteration—Registration - - - - - 193, 200
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—— Local Government Board, 1899, Form H
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SALARY—Harbour Constable—Collection of tolls - - - - - - 458
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SALE—In street—General dealer—Transaction outside district of license - - 6
See GENERAL DEALER. 2.

—— Of goods—Contract—Condition precedent to action - - - - - 545, 570
See ARBITRATION CLAUSE.

SANDPITS—*Pembroke township rate—Profits received out of land—Valuation Acts—Certificate of valuation—Column in which lands other than agricultural should appear—Pembroke Township Act*, 1863 (26 & 27 *Vict. c. lxxii*), *s.* 46—15 & 16 *Vict. c.* 63, *ss.* 11, 12.] By the Pembroke Township Act, 1863, the Pembroke Urban District Council is enabled to make a township rate upon the occupiers of lands, buildings, &c., within the township, according to the yearly value of the same. *P.* was the owner and occupier of sandpits within the township, and was rated on these, for the purpose of the township rate, in respect of the profits derived out of them:—*Held*, that the word "lands" in sect. 46 of the Pembroke Township Act is not used in the restricted sense applicable to the word in the Valuation Act, 1852,—viz., as meaning agricultural land only, but includes property such as the sandpits in question, and that *P.* was properly rated in respect of the profits received out of the same. In the certificate of valuation given under the Valuation Act, such property should be placed, not in the column headed "Lands," but in the column headed "Railways, Fisheries, Tolls, Half-rents, &c." *Hughes, Appellant*; *Earl of Pembroke and Vernon, Respondents* - - K. B. 473

SEAWORTHINESS — Negligence in loading cargo—List—Continuing voyage, 12, 52
See SHIP.

SEDUCTION—*Service—Evidence of—Family living on farm of their deceased father—Seduced woman acting as indoor servant at time of seduction—Action brought by her brother as plaintiff.*] Upon the death of a farmer, twenty-eight years prior to the commencement of the action, testate, but whose will was never proved, his widow and three children resided on the farm, which was managed by the widow until her death, which occurred eight years after that of her husband. Then her daughter, who was considerably older than the other two children (sons), and who was at that time the only adult member of the family, became manager, paid the rent, and got receipts in the name of her father's representatives. She also did the indoor servant's work, no servant being kept, and had charge of the domestic arrangements. Seven years later the elder of the two brothers attained twenty-one. From that time out he worked the farm, and was rated as the occupier. His sister continued to perform the duties of indoor servant, and to make things comfortable for her two brothers in the house. In an action by the eldest brother for the seduction of his sister:—*Held*, in the King's Bench Division, by Andrews and Boyd, JJ.; Gibson, J., *dissentiente*: and in the Court of Appeal, by Walker, C., and FitzGibbon, L.J.; Holmes, L.J., *dissentiente*, that there was evidence upon which the verdict of the jury in favour of the plaintiff could be sustained. What is adequate evidence of service in such cases considered. *Per* Gibson, J.: To sustain such an action the services must be rendered to some one entitled to them as master. The statement of the law in Pollock on Torts, on actions of this nature, considered and approved by FitzGibbon, L.J. *Murray* v. *Fitzgerald* - K. B. 254; APP. 260

SEED POTATOES—Contract by guardian with Board—Disqualification - - 173
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SERVANT.
See MASTER AND SERVANT.

SERVICE—Seduction—Evidence of 254, 260
See SEDUCTION.

SEWAGE WORKS — Contributory place—Area of charge - - - 206
See CONTRIBUTORY PLACE.

SHIP—*Duty of owners towards seamen — Seaworthiness—Negligence in loading cargo—Maize in bulk—List on ship in a port during the voyage—Shifting of cargo—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 458.] The *C.*, a ship belonging to the defendants, was chartered to carry a cargo of maize in bulk from Liverpool to Galway, and by the charter-party the charterers were to supply sufficient bags for stowage of the cargo, if required. The cargo, 642 tons, was loaded in bulk under the direction of a stevedore, and 111 bags were placed in coamings under the forward hatch. The *C.* left Liverpool on the 12th June, and arrived in Lough Swilly at 6 a.m. on the 13th, having had fine weather all the way. It was found at Lough Swilly that the ship had a list to port, as to the

SHIP—*continued.*
extent of which the evidence varied, from 5 to 20 degrees. Nothing was done to correct the list, and she left about 8 in the evening, and proceeded on her voyage. The list increased, and a gale of wind having sprung up, the vessel foundered. Seven of the crew were drowned. In an action under Lord Campbell's Act the jury found that all the necessary and reasonable precautions had not been taken to prevent the cargo from shifting as regards bagging and stowage, and that the vessel became unseaworthy for the voyage by reason of a list existing when she was in Lough Swilly: that the list was caused by the cargo shifting by reason of the omission of proper precautions:—*Held* (by Andrews and Kenny, JJ., *diss.* Boyd, J., and by the Court of Appeal), that there was evidence to sustain the verdict that the cargo was not properly loaded at Liverpool, and also that there was evidence to show that the ship was not seaworthy when she left Lough Swilly. *Cunningham* v. *Frontier SS. Co.* - - - - - K. B. 12; App. 52

SOLICITOR—*Costs—Taxation between party and party—Attendance of country solicitor on record as witness at trial in Dublin.*] A country solicitor, being solicitor on record for one of the parties, was examined at the trial of the action in Dublin, he being a material witness, and his attendance at the trial having been directed by counsel. The solicitor having claimed in his costs as between party and party his expenses of such attendance as a witness, the Taxing Master disallowed them, being of opinion that the case of *Colhoun* v. *M'Namee* (1 New Ir. Jur. 275) was an express decision that such claim could not be allowed:—*Held*, that the case of *Colhoun* v. *M'Namee* was not a conclusive authority necessarily excluding such claim, but that the right to such expenses depends in every case on a question of fact, viz.: Was the solicitor's attendance at the trial attributable to his character as solicitor or as witness? If the former, the claim should be disallowed; if the latter, allowed. *Held*, by Wright, J., that in the present case the solicitor being a material witness, his expenses should be allowed, subject to taxation. *Hamilton* v. *Colhoun* - - - - - - - - K. B. 104

STATUTES:

1 & 2 Wm. 4, c. 37—Truck Act - 405
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5 & 6 Vict. c. 106—Fisheries, s. 78 - 164
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11 & 12 Vict. c. 92—Fisheries, s. 21 - 219, 244
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—— ——, s. 12 (1) - - - - - 181
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14 & 15 Vict. c. 93—Petty Sessions, s. 24 164
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15 & 16 Vict. c. 63—Valuation, ss. 11, 12 473
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—— ——, s. 16 - - - - - - 479
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16 & 17 Vict. c. 51—Succession Duty, ss. 2, 13, 17 - - - - - - - 122
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16 & 17 Vict. c. 136—Grand Juries, ss. 7, 9
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17 Vict. c. 8—Valuation, s. 2 - - 479
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21 & 22 Vict. c. 64—Vaccination, ss. 1, 3 333
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26 & 27 Vict. c. lxxii.—Pembroke Township, s. 46 - - - - - - - 473
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27 & 28 Vict. c. 35—Beerhouses, ss. 3, 4
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37 & 38 Vict. c. 69—Licensing, ss. 8, 37
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40 & 41 Vict. c. 56—County courts and officers, s. 74 - - - - - - 164
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40 & 41 Vict. c. 57—Judicature, s. 28, sub-s. 6
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—— ——, s. 53 - - - - - 503
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41 & 42 Vict. c. 52—Public Health, s. 232, 206
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42 & 43 Vict. c. 70—Vaccination, s. 6 - 333
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44 & 45 Vict. c. 12—Customs and Inland Revenue, s. 38 - - - - 122, 200
See Estate Duty. 2.
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44 & 45 Vict. c. 49—Land Law, s. 21 - 79
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46 & 47 Vict. c. 43—Tramways, &c., s. 10 282
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49 & 50 Vict. c. lv.—Local Government Provisional Order Confirmation, Fermoy, s. 1 - - - - - - 487
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50 & 51 Vict. c. 33—Land Law, s. 1 - 79
See Land Law (Ireland) Acts.

52 Vict. c. 7—Customs and Inland Revenue, s. 11 - - - - 122, 200
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Succession Duty.

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56 & 57 Vict. c. 39—Industrial, &c., Societies, s. 10 (3) - - - - 193, 200
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57 & 58 Vict. c. 30—Finance, s. 2 (1) (*c*) 200
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57 & 58 Vict. c. 60—Merchant Shipping, s. 458 [12, 52
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59 & 60 Vict. c. 44—Truck Act, s. 1 - 405
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59 & 60 Vict. c. 47—Land Law, s. 16 - 79
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60 & 61 Vict. c. 37—Workmen's Compensation, s. 7 - - - - - - - 135
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61 & 62 Vict. c. 37—Local Government 206
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61 & 62 Vict. c. 50—Seed supply - 173
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63 & 64 Vict. c. 58—Tithe Rentcharge, ss. 2, 3 [465
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2 Edw. 7, c. 18—Licensing, s. 2, sub-s. 2 94
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3 Edw. 7, c. 37—Irish Land, ss. 2, 54 538
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—— ——, s. 90 - - - - - 465
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3 Edw. 7, c. 44—General Dealer's (Ir.), s. 1 6
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—— ——, ss. 2, 12 - - - - - 1
See GENERAL DEALER. 1.
STAYING PROCEEDINGS—Probate action—Trial—Cited parties—Compromise
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SUCCESSFUL PLAINTIFF—Trial without jury—Discretion of Judge as to costs
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SUCCESSION DUTY—*Revenue—Policy of life assurance — Premiums — Payment of — Marriage settlement — Predecessor — Disposition — Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 13, 17—*Customs and Inland Revenue Act*, 1881 (44 *Vict. c.* 12), *s.* 38—*Customs and Inland Revenue Act*, 1889 (52 *Vict. c.* 7), *s.* 11.] In 1853 a policy of insurance for £4000 was effected on his own life by *A*, in contemplation of his second marriage, and, by a contemporaneous marriage settlement, *C* (the mother of *A*'s first wife), who was entitled for her life to the interest upon certain securities representing £3500 late currency, and *A*, who was entitled to the interest on the same securities for his life from the death of *C*, joined in assigning their interest in these securities during the life of *A* to trustees, upon trust, during the life of *A*, to pay out of the annual proceeds thereof the premiums on the said policy of insurance, which, by the settlement, was assigned by *A* to the same trustees upon the trusts of the settlement. The settlement also contained a personal covenant by *A* with the trustees to pay the annual premiums upon the policy. The premiums were (it was assumed) paid by the trustees out of the annual proceeds of the trust securities. *A* died in 1876, leaving a widow and children of the second marriage, and *C* died in 1880, a stranger in blood to the said children. On an information by the Attorney-General, claiming succession duty:—*Held*, that *C* was not a "predecessor" within the meaning of sect. 2 of the Succession Duty Act, 1853, and that succession duty at the rate of £10 per cent. in respect of a moiety of the proceeds of the said policy of insurance, as upon a succession from *C*, was not payable under sections 2 and 13 of the same Act. *Attorney-General* v. *Riall* [K. B. 122

TAXATION OF COSTS—Attendance of country solicitor at trial in Dublin—Witness 104
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—— Less than £50 recovered - - 526
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TELEPHONE—Contract for use of—Rent in advance—Disconnecting - 115
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TENDER—Maximum license duty — Draft-net for eels - - - - 219, 244
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THIRD COUNSEL—Less than £50 recovered—More than £50 claimed - - 526
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TOLLS—Collection—Harbour constable—Additional remuneration - - 458
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TRUCK ACTS—(1 & 2 *Will.* 4, *c.* 37; 59 & 60 *Vict. c.* 44, *s.* 1)—*Master and servant—Contract of employment—Weekly wage for specified hours—Bonus for full-time work—Failure to put in full time—Deduction of bonus.*] A workwoman was employed at 8*s.* per week of 55½ hours, with a bonus of 2*s.* per week for full atteudance, and that alone. Printed rules, posted in the factory of employment, admittedly read by the workwoman, provided, *inter alia*, that "any person absent without reason, and not assigning satisfactory reason, shall lose bonus." The workwoman being absent for a quarter of a day without sufficient reason, 2*s.* 4*d.* was deducted from the weekly sum of 10*s.* which would otherwise have been payable to her. No question being raised as to the 4*d.* (representing the quarter of a day's wages):—*Held*, that the deduction of the 2*s.* bonus was not an offence under the Truck Acts. *Deane* v. *Wilson* - K. B. 405

URBAN DISTRICT COUNCIL—Breaking up road—Consent - - - - 487
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VACCINATION—*Local Government—Poor Law—Re-vaccination — Operations performed elsewhere than at dispensary districts or vaccination stations—Right of medical officer to fees—Report prescribed by Local Government Board Rules of* 1899—21 & 22 *Vict. c.* 64, *ss.* 1, 3—42 & 43 *Vict. c.* 70, *s.* 6.] The medical officer of a dispensary district is under no obligation to vaccinate or to re-vaccinate persons elsewhere than at the dispensary, or at the vaccination stations (if any) appointed under the provisions of 21 & 22 Vict. c. 64, and he canno recover fees from the guardians of the union for vaccination or re-vaccination performed elsewhere, although within his district:—*So held*, by Lord O'Brien, L.C.J., and Andrews and Wright, JJ.; Boyd, J. *diss. Held*, also, by Lord O'Brien, L.C.J, and Andrews and Wright, JJ., Boyd, J., *diss.*, that the form of report (Form H) prescribed by the General Rules of 24th February, 1899, for the government of Dispensary Districts is not *ultra vires*, and the making of a report in such form is a condition precedent to the right of the medical officer to recover fees from the guardians for vaccination or re-vaccination. *O'Sullivan* v. *Guardians of Donegal Union* - K. B. 333

VALUATION—Exemption from rating—Use exclusively for charitable purposes 479
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—— Profits received out of land - - 473
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VARIABLE RENT — *Ecclesiastical lease—Immediate and sub-perpetuity grant—Covenant—Reddendum—Purchase of fee-simple—Right of sub-grantee to vary rent—Tithe Rentcharge (Ireland) Act*, 1900, *ss.* 2, 3—*Irish Land Act*, 1903 *s.* 90.] In 1852 the plaintiff, an ecclesiastical lessee with customary right of renewal, who had obtained a grant in perpetuity under the Church Temporalities Acts, made a sub-grant in perpetuity, under the same Acts, to the defendant in respect of a sub-lease with *toties quoties* clause of renewal. The reddendum in this sub-grant was of the original rent, "or such increased or diminished yearly rent . . . as shall be substituted . . . on the terms specified in the covenant in the indentures of 3rd August, 1764, and 22nd March, 1836" (the original sub-lease and a renewal thereof), "pursuant to the proviso for that purpose in the recited Acts" (3 & 4 Wm. 4, c. 37, and 6 & 7 Wm. 4, c. 99). The covenant referred to, and which was contained in the original sub-lease and renewal, was to the effect that as often as the plaintiff should obtain a renewal he would renew the sub-lease on payment by the sub-lessee of one-third of the fines and expenses paid by the

VARIABLE RENT—*continued.*
immediate tenant to the See. The plaintiff purchased the fee under the Irish Church Act, 1869. In an action to recover one year's unvaried rent to the 1st May, 1905—*Held*, that the defendant (the sub-grantee) was entitled to a reduction under section 90 of the Irish Land Act, 1903. *Denny* v. *Wright* - - - - - - K. B. 465

WAGES—Bonus for full time— Failure to earn
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WATER SUPPLY — Contributory place — Powers of Local Governnment Board 206
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WITNESS—Country solicitor on record—Trial in Dublin—Costs - - - 104
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WORDS — "Dependants" — 60 & 61 Vict. c. 37, s. 7 - - - - 135
See WORKMAN.

—— "Expenses incurred"—41 & 42 Vict. c. 52, s. 232 - - - - - 206
See CONTRIBUTORY PLACE

—— "Expiration of lease"—2 Edw. 7, c. 18, s. 3 - - - - - 349
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—— "Hotel"—2 Edw. 7, c. 18, s. 2, sub-s. 2
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—— "Legible Letters"—14 & 15 Vict. c. 92, s. 12 (1) - - - - - 181
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—— "Person"—5 & 6 Vict. c. 106, s. 80 298
See CORPORATION.

—— "Predecessor"—16 & 17 Vict. c. 51, section 2 - - - - - 122
See SUCCESSION DUTY.

—— "Public bar"—2 Edw. 7, c. 18, sect. 2, sub-s. 2 - - - - - 94
See LICENSING ACTS. 2.

—— "Seaworthiness"—57 & 58 Vict. c. 60, s. 458 (1) - - - - 12, 52
See SHIP.

WORKMAN — *Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7—*Dependency on workman's earnings at time of death—Widow of deceased workman—Workman out of employment.*] The applicant, the widow of a deceased workman, was married on the 15th July, 1904, at Glasgow, both she and her husband being Scotch by domicil. She lived with her husband in Glasgow, and was supported by him till the end of October, 1904, when, being out of work, he went over to Dublin to seek employment. He obtained employment from the respondent on the 9th January, 1905, and, on the 17th January, 1905, he was accidentally killed by a fall from a window of a house in

WORKMAN—*continued.*
Dublin. From the time the husband left Glasgow until his death he did not contribute anything to the support of his wife, who went to reside with her father in Glasgow, and was supported by him. A posthumous child was born on the 15th April, 1905. Upon a claim for compensation brought on behalf of the widow and the infant child, the Recorder of Dublin held that the applicants were in part dependent on the earnings of the workman at the time of his death, and awarded compensation accordingly:—*Held*, by the majority of the Court of Appeal (Walker, C., and Holmes, L.J.; FitzGibbon, L.J., *dissentiente*), that the applicants were wholly dependent upon the earnings of the

WORKMAN—*continued.*
workman at the time of his death, within the meaning of sect. 7 (2) (a) of the Workmen's Compensation Act, 1897. *Per* FitzGibbon, L.J., that the Recorder's findings were that the applicants were not wholly dependent upon the earnings of the workman at the time of his death, and that they were in part so dependent; and that such findings could not be disturbed. *Queen* v. *Clarke* App. 135

—— Truck Acts—Bonus - - - 405
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YEARLY TENACY—Created by parol—Notice to quit—Publican's license - 349
See Licensing Acts. 3.

THE END.

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